

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. October 27, 2008
. 9:06 a.m.
.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Kirkland & Ellis, LLP
By: DAVID BERNICK, ESQ.
BARBARA HARDING, ESQ.
JANET BAER, ESQ.
LISA ESAYIAN, ESQ.
CRAIG BRUENS, ESQ.
BRIAN STANSBURY, ESQ.
SAL BIANCA, ESQ.
RAINA JONES, ESQ.
HENRY THOMPSON, ESQ.
SCOTT McMILLAN, ESQ.
200 East Randolph Drive
Chicago, IL 60601

For the Debtors: Kirkland & Ellis, LLP
By: THEODORE FREEDMAN, ESQ.
CHRISTOPHER GRECO, ESQ.
Citigroup Center, 153 East 53rd St.
New York, NY 10022

Audio Operator: Janet Heller

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268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@optonline.net

(609)586-2311 Fax No. (609) 587-3599

APPEARANCES (CONT'D):

For the Asbestos
Creditors Committee:

Caplin & Drysdale, Chartered
By: PETER LOCKWOOD, ESQ.
NATHAN FINCH, ESQ.
One Thomas Circle, NW
Washington, D.C. 20005

Caplin & Drysdale, Chartered
By: ELIHU INSELBUCH, ESQ.
375 Park Avenue, #3505
New York, NY 10152

For the Debtors:

ARPC
By: AMY BROCKMAN, ESQ.

For W.R. Grace:

W.R. Grace
By: MARK SHELNITZ, ESQ.
JAY HUGHES, ESQ.
WILLIAM CORCORAN, ESQ.
7500 Grace Drive
Columbia, MD 21044

For the Equity
Committee:

Kramer Levin Naftalis & Frankel
By: GREGORY HOROWITZ, ESQ.
919 Third Avenue
New York, NY 10022

For the
Unsecured Creditors'
Committee:

Stroock & Stroock & Lavan
By: KENNETH PASQUALE, ESQ.
ARLENE KRIEGER, ESQ.
180 Maiden Lane
New York, NY 10038-4982

For the Property
Damage Committee:

Bilzin Sumberg Baena Price &
Axelrod LLP
By: MATTHEW KRAMER, ESQ.
SCOTT BAENA, ESQ.
JAY SAKALO, ESQ.
200 South Biscayne Boulevard
Suite 2500
Miami, FL 33131

APPEARANCES (CONT'D):

For the Ad Hoc
Committee of Equity
Sec. Holders:

Dewey & LeBoeuf, LLP
By: JENNIFER WHITENER, ESQ.
125 West 55th Street
New York, NY 10019

For the Future
Claimants
Representatives:

Orrick, Herrington & Sutcliffe
LLP
By: ROGER FRANKEL, ESQ.
RICHARD WYRON, ESQ.
ANTHONY KIM, ESQ.
RAYMOND MULLADY, ESQ.
JOHN ANSBRO, ESQ.
Washington Harbour
3050 K Street, N.W.
Washington, D.C. 20007

For Committee of
Asbestos Personal
Injury Claimants:

Campbell & Levine
By: MARK T. HURFORD, ESQ.
800 North King Street
Suite 300
Wilmington, DE 19701

For Maryland Casualty:

Connelly Bove Lodge & Hutz, LLP
By: JEFFREY WISLER, ESQ.
The Nemours Building
1007 North Orange Street
Wilmington, DE 19899

For Maryland Casualty:

Eckert Seamans Cherin & Mellott, LLC
By: EDWARD LONGOSZ, II, ESQ.
1747 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20006

STB

By: STERLING MARSHALL, ESQ.

For Sealed Air:

Skadden, Arps, Slate, Meagher & Flom,
LLP
By: MARK CHEHI, ESQ.
DAVID TURETSKY, ESQ.
One Rodney Square
Wilmington, DE 19801

APPEARANCES (CONT'D):

Co-Counsel to Libby
Claimants: Cohn, Whitesell & Goldberg, LLP
By: DANIEL C. COHN, ESQ.
101 Arch Street
Boston, MA 02110

For Libby Claimants: Landis Rath & Cobb, LLP
By: RICHARD S. COBB, ESQ.
KERRI KING MUMFORD, ESQ.
919 Market Street
Wilmington, DE 19801

For Sealed Air: NERA Economic Consulting
By: STEPHANIE PLANCICH
1166 Avenue of the Americas
28th Floor
New York, NY 10036

For W.R. Grace: NERA
By: ELENA ZAPRYANOVA
LINDA SHEN

For Serengeti: Vinson & Elkins, LLP
By: ARI BERMAN, ESQ.
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, TX 75201

For Serengeti: By: BILLAL SIKANDER

For Silver Point
Capital: Silver Point Capital
By: JOHN KU
SERGEI FILIPOV, ESQ.

For the Debtors: Pachulski, Stang, Ziehl & Jones
By: JAMES O'NEILL, ESQ.
919 North Market Street
17th Floor
Wilmington, DE 19899-8705

For the Unsecured
Creditors' Committee: Strook & Strook & Lavan
By: LEWIS KRUGER, ESQ.
180 Maiden Lane
New York, NY 10038

APPEARANCES (CONT'D):

For Ad Hoc Committee:	Weil, Gotshal & Manges By: M. JARRAD WRIGHT, ESQ. 1300 Eye Street NW, Suite 900 Washington, D.C. 20005
For Official Committee of Equity Holders:	Kramer Levin Naftalis & Frankel LLP By: DOUG MANNAL, ESQ. 919 Third Avenue New York, NY 10022
For Continental Casualty Company:	Ford, Marrin, Esposito, Witmeyer & Gleser, LLP By: ELIZABETH DeCRISTOFARO, ESQ. Wall Street Plaza, 23rd Floor New York, NY 10005-1875
For Official Committee of Asbestos Property Damage Claimants:	Dies & Hile, LLP By: MARTIN DIES, ESQ. 1601 Rio Grande, Suite 330 Austin, TX 78701 ELIZABETH DEVINE, ESQ.
For Various Claimant Firms:	Stutzman, Bromberg, Esserman & Plifka By: DAVID J. PARSONS, ESQ. VAN J. HOOKER, ESQ. SANDER L. ESSERMAN, ESQ. 2323 Bryan Street Suite 2200 Dallas, TX 75201
For Fireman's Fund:	Stevens & Lee, P.C. By: JOHN DEMMY, ESQ. DAVID R. BEANE, ESQ. 1105 North Market Street, 7th Fl. Wilmington, DE 19801
For Owens-Illinois:	McCarter & English By: DANIEL SILVER, ESQ. Renaissance Centre, 405 N. King St. Wilmington, DE 19801

APPEARANCES (CONT'D):

For Asbestos Property Damage Claimants: Scott Law Group
By: DARRELL SCOTT, ESQ.
1001 East Main Street, Suite 500
Sevierville, TN 37864

For National Union Fire Insurance Co.: Zeichner Ellman & Krause, LLP
By: MATTHEW RUSSELL, ESQ.
ROBERT GUTTMANN, ESQ.
MICHAEL DAVIS, ESQ.
575 Lexington Avenue
New York, NY 10022

For the Future Claimants Representatives: Orrick, Herrington & Sutcliffe, LLP
By: DEBRA FELDER, ESQ.
JOSHUA CUTLER, ESQ.
Washington Harbour
3050 K Street, N.W.
Washington, D.C. 20007 For

For Federal Insurance Company: Cozen O'Connor
By: JEFFREY WAXMAN, ESQ.
Chase Manhattan Centre
1201 North Market Street
Wilmington, DE 19801

For Federal Insurance Company: Cozen O'Connor
By: JACOB C. COHN, ESQ.
1900 Market Street
Philadelphia, PA 19103

For Allstate Insurance: Cuyler Burk, LLP
By: ANDREW CRAIG, ESQ.
Parsippany Corporate Center
Four Century Drive
Parsippany, NJ 07054

For W.R. Grace: W.R. Grace
By: WILLIAM CORCORAN, ESQ.
7500 Grace Drive
Columbia, MD 21044

APPEARANCES (CONT'D):

For W.R. Grace:

Kirkland & Ellis, LLP
By: ELLEN AHERN, ESQ.
200 East Randolph Drive
Chicago, IL 60601

Kirkland & Ellis, LLP
By: DAVID MENDELSON, ESQ.
6555 Fifteenth Street, N.W.
Washington, DC 20005

For State of Montana
Department of
Environmental Quality:

Womble Carlyle Sandridge & Rice
By: FRANCIS MONACO, ESQ.
222 Delaware Avenue
Suite 1501
Wilmington, DE 19801

For State of Montana:

Christensen, Moore, Cockrell
By: DALE R. COCKRELL, ESQ.

For Official Committee
of Asbestos Personal
Injury Claimants:

Anderson Kill & Olick
By: ROBERT M. HORKOVICH, ESQ.
1251 Avenue of the Americas
New York, NY 10020-1186

For W.R. Grace:

Cohn Whitesell & Goldberg, LLP
By: NATHAN SOUCY, ESQ.
101 Arch Street
Boston, MA 02110

For CNA:

Goodwin Procter, LLP
By: DANIEL GLOSBAND, ESQ.
BRIAN MURKHERJEE, ESQ.
Exchange Place
Boston, MA 02109-2881

For Grace Certain
Cancer Claimants:

Montgomery, McCracken, Walker &
Rhoads, LLP
By: NATALIE D. RAMSEY, ESQ.
300 Delaware Avenue, Ste. 750
Wilmington, DE 19801

For David T. Austern,
the Future Claimants'
Representative:

Phillips, Goldman & Spence, P.A.
By: JOHN C. PHILLIPS, ESQ.
1200 North Broom Street
Wilmington, DE 19806

Tre Angeli, LLC
By: JOSEPH RADECKI, ESQ.

APPEARANCES (CONT'D):

For David T. Austern: Piper Jaffray & Co.
By: JONATHAN BROWNSTEIN, ESQ.

For W.R. Grace: Pachulski, Stang, Ziehl & Jones, LLP
By: TIMOTHY P. CAIRNS, ESQ.
919 North Market Street
17th Floor
Wilmington, DE 19899-8705

For the Asbestos
Creditors' Committee: Caplin & Drysdale, Chartered
By: WALTER SLOCOMBE, ESQ.
BERNARD BAILOR, ESQ.
JEANNA RICKARDS, ESQ.
JAMES WEHNER, ESQ.
LESLIE KELLEHER, ESQ.
One Thomas Circle, NW
Washington, D.C. 20005

For the Asbestos
Creditors' Committee: Ferry Joseph & Pearce, P.A.
By: THEODORE TACCONELLI, ESQ.
824 Market Street, Suite 19899
Wilmington, DE 19899

For Ford, Marrin,
Esposito, Witmeyer
& Gleser: Ford, Marrin, Esposito, Witmeyer &
Gleser
By: SHAYNE SPENCER, ESQ.
Wall Street Plaza
New York, NY 10005

For Pepsi: Butler Rubin Salfarelli & Boyd, LLP
By: KIRK T. HARTLEY, ESQ.
70 West Madison Street
Suite 1800
Chicago, IL 60602

For Official Committee
of Unsecured Creditors: Duane Morris, LLP
By: MICHAEL LASTOWSKI, ESQ.
1100 North Market Street, Suite 1200
Wilmington, DE 19801-1246

For Official Committee
of Asbestos Property
Damage Claimants: Brandi Law Firm
By: THOMAS BRANDI, ESQ.
TERENCE D. EDWARDS, ESQ.
44 Montgomery St., Suite 1050
San Francisco, CA 94104

APPEARANCES (CONT'D):

For the State of CA, Dept. of Gen. Services:	Hahn & Hessen, LLP By: CHRISTINA J. KANG, ESQ. 488 Madison Avenue, 14th Fl. New York, NY 10022
For Baron & Budd, et al.:	Hogan Firm Attorneys at Law By: DANIEL K. HOGAN, ESQ. 1311 Delaware Avenue Wilmington, DE 19801
For the PD Committee:	Speights & Runyan By: DANIEL SPEIGHTS, ESQ. ALAN RUNYAN, ESQ. MARION FAIREY, ESQ. 200 Jackson Avenue, East Hampton, SC 29924
For Royal Insurance:	Wilson Elser Moskowitz Edelman & Dicker, LLP By: CATHERINE CHEN, ESQ. 150 East 42nd Street New York, NY 10017
For David T. Austern:	Piper Jaffray & Co. By: JASON SOLGANICK
For Scott Company:	Vorys, Sater, Seymour & Pease, LLP By: TIFFANY COBB, ESQ. 52 East Gay Street Columbus, OH 43216
For London Market Companies:	Mendes & Mount, LLP By: ALEXANDER MUELLER, ESQ. 750 Seventh Avenue New York, NY 10019-6829
For Official Committee of Asbestos Property Claimants:	LECG By: ALAN MADIAN, ESQ.

APPEARANCES (CONT'D):

For Official Committee
of Asbestos Property
Claimants:

Richardson Patrick Westbrook &
Brickman, P.C.

By: EDWARD J. WESTBROOK, ESQ.
174 East Bay Street
Charleston, SC 29401

Hamilton, Rabinovitz & Alshuler
By: JOSHUA KATZ, ESQ.
FRANCINE RABINOVITZ, ESQ.

Conway Del Genio, Gries & Co, LLC
By: GREGORY BOYER, ESQ.
Lieff, Cabraser, Heinmann &
Bernstein
By: ELIZABETH J. CABRASER, ESQ.

Pryor Cashman LLP
By: RICHARD LEVY, ESQ.

Riker, Danzig, Scherer, Hyland
& Perretti, LLP
By: CURTIS PLAZA, ESQ.
One Speedwell Avenue
P.O. Box 1981
Morristown, NJ 07962

For Avenue Capital
Group:

CHELSEA CLINTON, ESQ.

For W.R. Grace:

WILLIAM SPARKS, ESQ.

For Ivory Investment:

Ivory Investment
By: DHANANJAY PATWARDHAN

For Linden Advisors:

Linden Advisors, LP
By: CRAIG GILBERT

For O'Conner:

O'Conner
By: JOHN R. WOLLEN

For Credit Suisse
First Boston:

Credit Suisse First Boston
By: TIM McARDLE

APPEARANCES (CONT'D):

For King Street Capital Management, LLC: King Street Capital Management, LLC
By: KIM CHRISTENSEN, ESQ.

For the Blackstone Group: The Blackstone Group
By: JOHN O'CONNELL

For Dune Capital Mgmt: Dune Capital Management
By: GUY BARON

For Anchorage Advisors: Anchorage Advisors
By: JONATHAN LEWINSOHN

For Lehman Brothers: Lehman Brothers
By: ANDREW CHAN

For Caxton Associates: Caxton Associates, LLC
By: JAMES RIEGER

For Dow Jones News Wires: Dow Jones News Wires
By: PEG BRICKLEY

For Citadel Investment Group: Citadel Investment Group
By: ASHOK VASVANI

For Durham Asset Management: Durham Asset Management
By: JEFFREY A. ROSENKRANZ

For Murray Capital Management: Murray Capital Management, Inc.
By: MARTI MURRAY

For Korn Capital, LLC: Korn Capital, LLC
By: STEPHANIE KWONG

For Levin Capital Strategies: JOHN P. MACKIN, ESQ.

For Morgan Stanley Senior Funding, Inc.: Katten, Muchin, Rosenman LLP
By: NOAH HELLER, ESQ.
MERRITT PARDINI, ESQ.
JEFF FRIEDMAN, ESQ.

APPEARANCES (CONT'D):

For Irwin H. Zandman: Irwin H. Zandman
By: IRWIN H. ZANDMAN

For Venor Capital: MICHAEL SCOTT, ESQ.
Washington, DC

For Asbestos Claimants: Brayton Purcell, LLP
By: CHRISTINA SKUBIC, ESQ.
222 Rush Landing Road
Novato, CA 94948

For Halycon Asset
Management LLC: Halcyon Asset Management, LLC
By: JOHN GREENE

For The Scotts Co.: Vorys, Sater, Seymour and Pease,
LLP
By: MATTHEW DAIKER, ESQ.
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216

For Private Investors: WILLIAM M. WAGNER

For Bank of New York: ANDREW HAIN, ESQ.

For WR Grace
Shareholder: Tocqueville Asset Management
By: PETER SHAWN

For Everest Reinsurance Co. & McKinley Ins. Co.: Crowell & Moring, LLP
By: MARK D. PLEVIN, ESQ.
LESLIE A. EPLEY, ESQ.
LESLIE DAVIS, ESQ.
1001 Pennsylvania Avenue, NW
Washington, DC 20004

For Everest Reinsurance Co. & McKinley Ins. Co.: Marks, O'Neill, O'Brien &
Courtney, P.C.
By: JOHN D. MATTEY, ESQ.
BRIAN KASPRZAK, ESQ.
913 North Market St., Suite 800
Wilmington, DE 19801

APPEARANCES (CONT'D):

For ERISA: Lowenstein Sandler PC
By: IRA LEVEE, ESQ.
MICHAEL ETKIN, ESQ.

For Equity Committee: RICHARD WESCHLER, ESQ.

For Kaneb Pipe Line
Operating Partnership: Fulbright & Jaworski
By: STEVE PEIRCE, ESQ.

For Laura Hammond: Dune Capital Management
By: LAURA HAMMOND

For Her Majesty the
Queen in Right of
Canada: Office of the Attorney General
By: JACQUELINE DAIS-VISCA, ESQ.

For Creditors'
Claimants: Reaud Morgan & Quinn LLP
By: CHRIS PORTNER, ESQ.

For Bank of America: Richards, Layton & Finger, P.A.
By: MARCOS A. RAMOS, ESQ.
One Rodney Square
920 N. King Street
P.O. Box 551
Wilmington, DE 19899

For Travelers Ins. Co. Simpson, Thacher & Bartlett, LLP
By: ELISA ALCABES, ESQ.
425 Lexington Avenue
New York, NY 10017

For BNSF: Pepper Hamilton
By: ANNE HARANSON, ESQ.

For PD/FCR: ALAN RICH, ESQ.

For Loan Maker/
Long Acre: Pepper Hamilton
By: DENNIS VERY, ESQ.

For the U.S. Trustee: JOSEPH FORNARI, ESQ.

APPEARANCES (CONT'D):

For Seaton Ins. Co.: Drinker Biddle & Reath LLP
 By: MICHAEL F. BROWN, ESQ.
 One Logan Square
 18th & Cherry Streets
 Philadelphia, PA 19103

For Royal Indemnity: Wilson, Elser, Moskowitz, Edelman
 & Dicker, LLP
 By: CARL PERNICONE, ESQ.
 New York, NY 10019

1 THE COURT: Please be seated. This is the matter of
2 W.R. Grace, Bankruptcy Number 01-1139. I have a list of
3 participants by phone.

4 Michael Davis, Ashok Vasvani, Robert Guttman,
5 Theodore Tacconelli, Sander Esserman, Peg Brickley, Marti
6 Murray, John Matthey, Mark Plevin, Brian Kasprzak, Kerri
7 Mumford, Sergei Filipov, Arlene Krieger, Lisa Esayian, David
8 Parsons, Ira Levee, Jonathan Lewinsohn, Joshua Katz, Richard
9 Levy, Marion Fairey, Jennifer Whitener, Andrew Craig, John
10 Mackin, Natalie Ramsey, Noah Heller, Curtis Plaza, Chelsea
11 Clinton, Janet Baer, Matthew Kramer, Thomas Brandi, William
12 Sparks, Christina Kang, Terrence Edwards, Richard Cobb, Scott
13 Baena, Alex Mueller, Theodore Freedman, Christopher Greco,
14 Barbara Harding, Shayne Spencer, Brian Murkherjee, Ari Berman
15 Richard Weschler, Martin Dies, Mark Shelnitz, Dale Cockrell,
16 Leslie Davis, Joseph Radecki, Daniel Hogan, Steve Peirce,
17 Merritt Pardini, Edward Westbrook, Laura Hammond, Robert
18 Horkovich, John Phillips, Michael Etkin, Jacqueline Dais-Visca,
19 Francine Rabinovitz, Jay Sakalo, Elizabeth Devine, Chris
20 Portner, Jeff Friedman, Gregory Boyer, Darrell Scott, Debra
21 Felder, David Bernick, Daniel Speights, Alan Runyan and
22 Elizabeth Cabraser.

23 I'll take entries in court, good morning.

24 MR. BERNICK: Good morning, David Bernick for Grace.

25 MR. FREEDMAN: Good morning, Your Honor, Theodore

1 Freedman for Grace.

2 MS. BAER: Good morning, Your Honor, Janet Baer for
3 Grace.

4 MR. BRUENS: Good morning, Your Honor, Craig Bruens
5 for Grace.

6 MR. MANNAL: Good morning, Your Honor, Doug Mannal
7 for --

8 THE COURT: One second, please. I'm sorry, your
9 name?

10 MR. MANNAL: Doug Mannal, Kramer Levin.

11 THE COURT: Thank you.

12 MR. O'NEILL: Good morning, Your Honor, James O'Neill
13 for Grace.

14 MR. LOCKWOOD: Good morning, Your Honor, Peter
15 Lockwood for the Asbestos Claimants Committee.

16 MR. FRANKEL: Good morning, Your Honor, Roger Frankel
17 for the PI Future Claimants Representative.

18 MR. WYRON: Good morning, Your Honor, Richard Wyron
19 also for the PI FCR.

20 MR. PASQUALE: Good morning, Your Honor, Ken Pasquale
21 from Stroock for the Unsecured Creditors' Committee. With me
22 in court is Arlene Krieger of Stroock.

23 MS. KRIEGER: Good morning.

24 MR. SAKALO: Good morning, Your Honor, Jay Sakalo on
25 behalf of the Property Damage --

1 THE COURT: Wait, I'm sorry, you're going too fast
2 for me.

3 MR. SAKALO: I'm sorry.

4 THE COURT: Okay, thank you, sir.

5 MR. SAKALO: Good morning, Jay Sakalo on behalf of
6 the Property Damage Committee.

7 THE COURT: Thank you.

8 MR. BAENA: Good morning, Judge, Scott Baena on
9 behalf of the Property Damage Committee.

10 THE COURT: Good morning.

11 MR. SPEIGHTS: Good morning, Your Honor Dan Speights
12 on behalf of Anderson Memorial Hospital.

13 MR. FORNARI: Good morning, Your Honor, Joseph
14 Fornari on behalf of the United States Trustee.

15 MR. COBB: Good morning, Your Honor, Richard Cobb, of
16 Landis, Rath and Cobb on behalf of certain of the bank lenders.

17 MR. BROWN: Good morning, Your Honor, Michael Brown
18 on behalf of Seaton Insurance Company and One Beacon America
19 Insurance Company.

20 MS. DeCRISTOFARO: Good morning, Your Honor,
21 Elizabeth DeCristofaro for Continental Casualty Company.

22 MR. GLOSBAND: Good morning, Your Honor, Dan Glosband
23 also for Continental Casualty Company.

24 MR. PERNICONE: Good morning, Your Honor, Carl
25 Pernicone in for Arrowwood Indemnity, formerly Royal Indemnity

1 Company.

2 MR. COHN: Good morning, Your Honor, Jacob Cohn for
3 Federal Insurance Company.

4 THE COURT: Good morning.

5 MR. DEMMY: Good morning, Your Honor, John Demmy of
6 Stevens and Lee for Fireman's Fund Insurance Company.

7 MR. COHN: Good morning, Your Honor, Daniel Cohn for
8 the Libby claimants.

9 THE COURT: Good morning.

10 MR. RAMOS: Good morning, Your Honor, Marcos Ramos,
11 Richards, Layton and Finger on behalf of Bank of America.

12 MR. CHEHI: Good morning, Mark Chehi of Skadden Arps,
13 and my colleague David Turetsky for Sealed Air Corporation.

14 MR. LEVY: Richard Levy of Pryor Cashman on behalf of
15 the Property Damage Claimants, represented by Dies & Hile.

16 MS. ALCABES: Good morning, Your Honor, Elisa Alcabes
17 from Simpson Thacher for Travelers.

18 MS. HARANSON: Good morning, Your Honor, Anne
19 Haranson from Pepper Hamilton, for BNSF Railway.

20 MS. COBB: Good morning, Your Honor, Tiffany Cobb of
21 the Vorys, Sater, Seymour and Pease law firm on behalf of the
22 Scotts Company.

23 MR. RICH: Good morning, Your Honor, Alan Rich for
24 the PD FCR.

25 THE COURT: Good morning.

1 MR. VERY: Good morning, Your Honor, Dennis Very for
2 Long Acre.

3 MR. WISLER: Good morning, Your Honor, Jeffrey Wisler
4 on behalf of Maryland Casualty Company and on behalf of Zurich
5 Insurance Company and Zurich International Inc.

6 MR. CRAIG: Good morning, Andrew Craig on behalf of
7 Allstate Insurance Company.

8 MR. MONACO: Good morning, Your Honor, Frank Monaco
9 on behalf of the Crown and State of Montana.

10 THE COURT: Anyone else? Okay, Mr. Bernick, Mr.
11 Freedman?

12 MR. FREEDMAN: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. FREEDMAN: So, today, this happy day, marks the
15 beginning of the disclosure statement hearing in connection
16 with the joint plan that was filed by the debtors, the Asbestos
17 Claimants Committee, the Asbestos Claimants Future
18 Representative and the Equity Committee.

19 The plan was filed on September 19th and then a
20 motion to approve the disclosure statement and solicitation
21 procedures was filed on the 20th, excuse me the 25th. The
22 deadline for objections was October 17th and we are now moving
23 forward to address all of the various objections that were
24 filed.

25 Your Honor, we submitted a brief last Friday, excuse

1 me, last Thursday, which set forth all of the objections in a
2 Schedule B, and as we proceed forward today, I'd like to work
3 from that schedule although for purposes of the presentation, I
4 want to reorganize it a bit, in order to get through the
5 materials in what I believe the Court will find to be an
6 efficient way.

7 We've also prepared and I'd like to hand up to the
8 Court, a kind of a cross reference chart which actually
9 identifies the particular objection, where it sits on the
10 Court's agenda, so that the Court can refer to it from the
11 books that she has. And the particular objection items that
12 are identified on the chart.

13 THE COURT: Okay, thank you.

14 MR. FREEDMAN: It seemed to us that the best way to
15 proceed on this, Your Honor, is to kind of organize our
16 presentation in the following way.

17 We'd like to start by walking the Court through a
18 number of matters that are kind of big picture matters that
19 relate to either amendments, which will affect the language of
20 the plan or additional pleadings that remain to be filed in
21 order for the plan to be a complete package and we believe that
22 many of the objections that were filed will be disposed of when
23 these various steps are taken. But I'd like to bring the Court
24 up to date on that.

25 After we've gone through that, I'd like to talk to

1 the Court about three categories of objections that fall into a
2 logical block, those being objections to the disclosure
3 statement as to which an objector had identified certain
4 language that the proponents and particularly the debtors will
5 agree to accept and while we haven't filed an amended
6 disclosure statement, we will file with that language and we
7 can point to the Court the precise language.

8 Secondly would be matters as to which we have agreed
9 in principle that additional disclosure is required, but it
10 will require some drafting and talking with the objector in
11 order to get to a point where we can at least see if we can get
12 to mutually acceptable language.

13 And then the last is a category of objections where
14 we haven't concluded that the objection should be overruled as
15 to the approval of the disclosure statement, but we want to
16 take some time and look at the issue and will supplement the
17 disclosure statement after we've had a chance to consider it.
18 All of those matters we will walk through this morning.

19 After that, Your Honor, it seemed to us that the next
20 appropriate matter for the Court today would be to address the
21 block of objections which the debtors regard as being plan
22 objections, and ask the Court to rule that those matters, which
23 we've identified as plan confirmation objections should be
24 deferred until the confirmation hearing, so that we don't need
25 to spend further time dealing with disclosure statement issues

1 that relate to something that should really be dealt with as a
2 confirmation objection.

3 And then, finally, having got through all of that
4 material I'd like to go back and talk about a relatively few
5 number of objections to the disclosure statement that are
6 objections to, which the Court, we believe should overrule, as
7 not being appropriate for further disclosure. But it would be
8 most efficient to get to that category after we've gotten
9 through the stuff that I've indicated first.

10 THE COURT: All right.

11 MR. FREEDMAN: So, with the Court's permission, I'd
12 like to now turn to the matters as to which we think there will
13 be amendments to the plan, or additional filings that will
14 amend the plan documents and so forth.

15 And if you'll just bear with me here, first off, Your
16 Honor, a number of parties have raised an issue about whether
17 or not claimants in Class 9, general unsecured creditors in
18 Class 9, who are not part of the lender group, should be
19 permitted the opportunity to come forward and demonstrate that
20 under applicable bankruptcy or non-bankruptcy law, they should
21 be entitled to a rate of interest, pendency interest which is
22 different from the rate that is provided in the plan.

23 And the debtors have agreed to amend the plan to
24 provide a procedure similar to the one that was adopted in the
25 USG plan, which would permit that process to occur.

1 For reference, Your Honor, because it will be useful
2 to know which objections we're talking about as being disposed
3 of by this amendment and I'll do this as we go through each one
4 of these, the General Unsecured Committee has raised this
5 objection in items 1, 2, 7 and 70 of the chart and the U.S.
6 Trustee has also raised the objection in item 13 on the chart
7 and if that way of referring to it is acceptable, I'll just use
8 that practice throughout.

9 THE COURT: That's fine.

10 MR. FREEDMAN: So, again, what we're going to do is
11 to amend the plan, to include a procedure similar to USG
12 whereby holders of creditors in Class 9 can come forward prior
13 to confirmation and seek, that is, they will note their intent
14 to come forward prior to confirmation and seek -- request that
15 they be paid post petition interest at a rate different from
16 what's provided in the plan. The procedures for actually
17 determining that they are so entitled will incur after the
18 effective date and those procedures will be governed by claims
19 allowance rules as if the objection was being held
20 pre-effective date but the actual objection process will be a
21 claims allowance objection that will be post effective date.

22 The only issue that would relate to such objections
23 would be the rate of pendency interest. The claimant, for this
24 purpose, would not have to demonstrate the entire amount of
25 their claim, there may be other objections that we

1 affirmatively file with respect to their claim that will
2 implicate different procedures, but as to ths particular
3 amendment, which we refer to as the USG procedure, it will be
4 solely directed to the appropriate pendency interest rate that
5 the claimant is entitled to.

6 And I should note, Your Honor --

7 THE COURT: I'm sorry, so this will not, to the
8 extent that someone has an objection to claim, the process will
9 not involve an allowance process but only a determination of
10 the interest rate?

11 MR. FREEDMAN: No, Your Honor. There are two
12 potential objections that may be raised to general unsecured
13 claims. One objection will be that the claim itself is
14 invalid. And to the extent that it is an objection to that
15 claim, then the process will involve all issues related to the
16 validity of the claim.

17 To the extent that the issue is whether or not the
18 particular creditor is entitled to a rate of interest different
19 from the rate of interest contemplated by the plan, but the
20 debtor otherwise does not dispute the merits of the claim, the
21 only issue would be the rate of interest. Does that answer the
22 Court's question?

23 THE COURT: I just wanted to make sure I wasn't going
24 through two objection processes for one claim.

25 MR. FREEDMAN: I appreciate your pointing that out

1 and we haven't drafted the language, so we will make sure that
2 the language is clear on that point.

3 THE COURT: Okay. Does anyone -- do you want to find
4 out whether people want to be heard on these issues as you go
5 along, maybe it would make sense to --

6 MR. FREEDMAN: Sure.

7 THE COURT: -- sort of put them to bed one at a time.
8 Does anyone have an objection to that resolution?

9 MR. PASQUALE: Your Honor, Ken Pasquale for the
10 Unsecured Creditors' Committee. We do not have an objection to
11 that resolution. Of course, the proof is in the pudding we
12 need to see the language, but the process is certainly one we
13 raised in our objection.

14 THE COURT: Okay, fine. All right, Mr. Freedman,
15 thanks.

16 MR. FREEDMAN: Your Honor, would it be possible just
17 to turn off this --

18 THE COURT: Turn it off? Yes, sure.

19 MR. FREEDMAN: Thank you. The next plan amendment
20 that the debtors intend to make which is implicated by General
21 Unsecured Creditors' Committee objections identified on the
22 chart as number 6, 8, 70, 75 and 74, and also Long Acre
23 objection number 16, have to do with the process for making
24 objections to claims and also providing a notice that certain
25 claims, certain general unsecured claims will not be objected

1 to. And the debtors intend to file a list of claims for which
2 they have no objections and the plan will incorporate that
3 concept. And also propose to amend the plan to provide that
4 requests for extensions of the objection deadline may only be
5 obtained on notice to the claimants. The plan was unclear,
6 frankly, about that point, whose claims are still pending.

7 There is also an objection that falls into this
8 category that relates to the timing for payment of the claim
9 itself. The plan in two places both in the actual treatment
10 section on the general unsecured claim and also in the general
11 statement about what it means to say that a claim is going to
12 be paid on the effective date, contemplates that the payment
13 would be made on the effective date or as soon as reasonably
14 practical thereafter.

15 That language is ubiquitous in plans of this sort,
16 the debtors have not inserted that language with any hidden
17 agenda to delay making payment and intend to make the payment
18 on the effective date, or as soon as reasonably practicable
19 thereafter. Some claimants have raised a disclosure statement
20 objection that the disclosure of that point is not adequate and
21 we would certainly make clear that that is the process that
22 would be used. It's not clear to me whether or not there may
23 also be a confirmation objection that goes to that issue and we
24 can defer any such discussion of that point, which we believe
25 not to be a meritorious argument.

1 THE COURT: Was it a feasibility issue? Or is it
2 simply a disclosure that the disclosure statement is not clear
3 as to when the debtor intends to pay?

4 MR. FREEDMAN: I believe this was part of what the
5 General Unsecured Creditors' Committee complained about and
6 maybe Mr. Pasquale could elaborate on his objection on that
7 point.

8 THE COURT: Mr. Pasquale.

9 MR. PASQUALE: Thank you, Your Honor. Yes, the
10 disclosure statement has no description, whatsoever, about what
11 the debtors intend by, as reasonably practical as to payment.
12 There is no end date to that, whatsoever. Theoretically, it
13 could go till the end of time.

14 THE COURT: Oh, so you wanted something like when the
15 claim is allowed, so many days after the claim is allowed.

16 MR. PASQUALE: There needs to be some finite date on
17 that, so everyone understands when payment would be expected.

18 THE COURT: Okay. All right, can the debtor add
19 something?

20 MR. FREEDMAN: Sure, we would do that, Your Honor.

21 THE COURT: All right.

22 MR. FREEDMAN: The next issue that we intend to amend
23 the plan on has to do with the objection of the General
24 Unsecured Creditors' Committee expressed in item number 79 on
25 the chart, identified in item number 79 on the chart, as to the

1 plan's inadequate provision for the continued existence of the
2 General Unsecured Creditors' Committee after the effective
3 date. It's the intention of the debtors to provide in the plan
4 that the General Unsecured Creditors' Committee will have a
5 continuing existence past the effective date for purposes that
6 are consistent with the continued existence of the other
7 committees that are already provided for in the plan.

8 The precise language and exactly what the details of
9 that are, remain to be worked out with the General Unsecured
10 Creditors' Committee. We hope we can work it out so that the
11 Court won't ever hear of the issue again. But we will be
12 amending the plan in that respect.

13 THE COURT: All right. Mr. Pasquale, I take it you
14 just need to talk to the debtor about this.

15 MR. PASQUALE: We need to work out the language, Your
16 Honor, and we also need to consider the ongoing litigation
17 regarding the post petition interest issues.

18 MR. FREEDMAN: The next one, Your Honor, is with
19 respect to the plan's treatment of the assumption of executory
20 contracts and that's identified on line item 78 of the chart
21 and the General Unsecured Creditors' Committee has asked that
22 the plan be amended to provide for a process regarding notice
23 of cure, that is the amounts that would be required to cure to
24 holders of executory contracts and also an opportunity to
25 object to the assumption. The debtors will amend the plan

1 procedures in Section 9.1 to provide for that.

2 THE COURT: Okay. Mr. Pasquale, okay?

3 MR. PASQUALE: Yes, Your Honor.

4 THE COURT: All right.

5 MR. FREEDMAN: Your Honor, the next one is an
6 objection that is raised by CNA in line items 50 and 108 of the
7 chart and also item 76 on the chart of the General Unsecured
8 Creditors' Committee.

9 And, that issue has to do with the way in which
10 claims are deemed to be allowed or disallowed under the plan
11 and the relevant effect of Section 502(e) with respect to the
12 allowance of claims as it relates to the TDP. Also whether or
13 not a general unsecured claim would be deemed disallowed if no
14 formal objection has been filed.

15 As to the matters that don't relate to asbestos
16 claims that are going to be covered by the channeling
17 injunction and treated under the TDP, the debtors would amend
18 the plan to make clear that if a proof of claim has been filed,
19 it will be deemed objected to only if there is a formal
20 objection filed to the claim, with the exception of the certain
21 employee claims which under the plan the debtors contend are
22 properly treated by -- saying that the plan constitutes a
23 deemed objection, that's a matter to be discussed subsequently.
24 But as to other than these employee claims, we would have to
25 file a notice of objection for a matter that is subject to a

1 proof of claim, which we believe is what the law requires.

2 As to the matters that are related to the way in
3 which the TDP treats asbestos claims that will be handled under
4 the TDP, I'll just summarize it by saying that we think that,
5 and I believe that the Asbestos Claimants Committee and the FCR
6 agree that the TDP may be somewhat ambiguous on the concepts of
7 allowance and disallowance as it relates to the TDP and we're
8 going to examine that language and amend the TDP to the extent
9 it's appropriate. Is that --

10 MR. LOCKWOOD: That's correct.

11 THE COURT: Okay. I didn't understand the point
12 about the employee claims, that the plan is going to be deemed
13 an objection?

14 MR. FREEDMAN: The plan contemplates that there are
15 a number of employee benefits claims and as to those employee
16 benefits claims, the plan constitutes a deemed objection to
17 those claims. We will deal with issues related to notice and
18 solicitation, that will allow those claimants to be properly
19 noticed of their objection subsequently, as we get to the
20 point. But what we've in effect provided and the disclosure
21 will be absolutely clear on this, is that as to this package of
22 claims filed by employees for benefits, many of which the
23 debtors would dispute, that the debtors -- that the plan itself
24 constitutes a deemed objection to those claims, which will
25 permit the debtors to not have to start a formal claims

1 allowance process by filing an objection as to each one of
2 those claims.

3 And we think that that procedure in this particular
4 case, is an appropriate procedure that's permitted for dealing
5 with that kind of a claim.

6 THE COURT: Well, are these current employees?

7 MR. FREEDMAN: Some are current, and some are
8 retirees. The point, Your Honor, though, is that all of them
9 will be very clearly notified about the fact that the debtor is
10 intending to deal with their claims in this way and they will
11 have the opportunity to contest their claims like every other
12 claims allowance process but there are many, 7,000 claims that
13 fall within this category and it seemed the most efficient way
14 to treat it, by providing that kind of --

15 THE COURT: Well, maybe as long ss they're not going
16 to get this in another package of, you know, plan disclosure
17 statement issues and it gets buried somewhere because that's
18 not effective notice and that's the problem. They need a
19 separate piece of paper and a separate mailing, or something
20 that is going to be real effective notice, not just something
21 slipped into another, you know, 45 pages or 100 page worth of
22 documents so that it gets slipped by.

23 So, you know, it's one thing to say that the plan
24 deems -- it is deemed the objection, I'm not sure that makes
25 much difference, but they need some real effective notice. So,

1 you can work with the various committees to figure out what
2 that is. I don't have a problem with the plan being deemed the
3 objection, but I do have a problem with the notice.

4 MR. FREEDMAN: Thank you, Your Honor, we understand
5 that.

6 THE COURT: Okay.

7 MR. PASQUALE: Your Honor, excuse me, may I --

8 THE COURT: Yes.

9 MR. PASQUALE: -- Ken Pasquale for the committee. Mr.
10 Freedman mixed a couple of concepts in that last presentation.
11 There is also a provision in the disclosure statement, I think
12 what I heard Mr. Freedman say is with respect to, let's call
13 them non-employee claims, that the provision now in the plan
14 that would deem disallowed as of the effective date claims even
15 where no objection has been filed, that that is going to be
16 changed. In other words a claim objection must be filed for a
17 claim to be disallowed.

18 MR. FREEDMAN: Yes. Right, we intend to change that,
19 Your Honor.

20 MR. PASQUALE: Okay.

21 MR. FREEDMAN: Next, Your Honor, are --

22 THE COURT: Wait one second, Mr. Freedman, I'm sorry.
23 Give me a chance to get caught up here.

24 (Pause)

25 THE COURT: The employee claims that this is

1 affecting, are they all in Class 9?

2 MR. FREEDMAN: They're a separate class, Your Honor.

3 THE COURT: They're a separate class, okay.

4 MR. FREEDMAN: Yes.

5 THE COURT: So they are going to be deemed an
6 impaired class.

7 MR. FREEDMAN: No, they'll be paid a hundred cent
8 dollars, it's just an issue of whether or not they are going to
9 be objected to and how the plan objection to the allowance of
10 the claim as opposed to the issue of impairment.

11 THE COURT: Oh.

12 MR. FREEDMAN: But they will get a solicitation
13 package for non-consenting classes and also a separate and
14 clear notice that the plan constitutes an objection to their
15 claim.

16 THE COURT: Okay. They're not in Class 9. Okay, so
17 you're still planning to pay 100 percent of whatever their
18 benefits are, it's just that you're objecting -- why are you
19 objecting to them if you're going to pay them?

20 MR. FREEDMAN: 95 percent of the employee claims we
21 believe are legitimate, but there are some that are, in our
22 view, clearly not appropriate for allowance and subject to
23 objection. Just amounts that are overreaching and not
24 reflecting what the debtor believes its obligations to these
25 employees are. And we will be objecting to those claims.

1 THE COURT: I see. So, you're going to pay 100
2 percent of the allowed claims but these 7,000 are the ones that
3 you think are objectionable.

4 MR. FREEDMAN: The 7,000 are all the employee claims,
5 the ones that we think are objectionable are the smaller group.

6 THE COURT: Within that set.

7 MR. FREEDMAN: Within that 7,000.

8 THE COURT: Okay, you confused me. I thought you
9 were saying there were 7,000 that you were filing objections
10 to.

11 MR. FREEDMAN: No. We are not --

12 THE COURT: All right. Can you start it again and
13 tell me what is it, with respect to these employee claims that
14 you're objecting to.

15 MS. BAER: Your Honor, we have about 7,000 employee
16 claims, we have not gone through claim by claim by claim and
17 done an objection process for them. What we've seen is that
18 most of these are typical, they're fine. They were employees,
19 they were former employees, they're owed something by W.R.
20 Grace and under the plan that obligation passes through the
21 reorganized debtor, they will be paid in the ordinary course of
22 Grace, pursuant to the various pension plan employee claim
23 related documents.

24 But there are some that are filed as employee claims
25 that are not employee claims, they were never an employee,

1 they're not a former employee, they're just something that was
2 filed this way, but clearly is not an employee claim.

3 What the mechanism will do is basically say if you've
4 got an employee claim, you fall within X category, your claim
5 is fine, it passes through, but if you don't fit within this
6 category, you don't fit this definition, this plan constitutes
7 an objection to your claim.

8 THE COURT: Well, how are the folks going to know
9 whether or not you are or are not objecting? I mean, you have
10 to identify who it is that you're objecting to, because
11 otherwise somebody who has filed a claim is going to say, well,
12 my claim is okay, I filed it and I was an employee. Unless you
13 tell a person that you are objecting to that claim, they won't
14 know that you've objected to the claim.

15 MS. BAER: It's done by definition. If they fall
16 within the definition they're fine, if they don't fall within
17 the definition it's being objected to.

18 THE COURT: No, that won't work, no. You can't do
19 that. You have to notify each claimant that you are objecting
20 to their claim or not. That's the way it works. You've got to
21 do that. You have to undertake that process.

22 MS. BAER: What we can do then is, we can build in
23 the mechanism, but build in the list, if you will.

24 THE COURT: You have to build in the list, because
25 otherwise they won't know whether you're paying them or not

1 paying them and that may or may not affect their vote and that
2 will definitely affect what the reorganized debtors'
3 obligations are.

4 MS. BAER: They won't be voting, though, it's an
5 impaired class. I mean, not -- an unimpaired class. If they
6 have an allowed claim, they get paid 100 percent.

7 THE COURT: But they won't know whether they have an
8 allowed claim.

9 MS. BAER: Right, that's the objection process.

10 THE COURT: So, you have to build in whether you are
11 or are not objecting to that treatment. You have to give them
12 a list that says, you know, person A, I'm objecting to your
13 claim, person B I'm not objecting to yours. You must tell the
14 person who has filed the claim that you are or are not
15 objecting to their claim.

16 MS. BAER: Okay.

17 MR. FREEDMAN: That's fine, Your Honor. We
18 understand your instructions.

19 All right, the next category, Your Honor, relates to
20 --

21 THE COURT: I'm sorry someone else wants to be heard.

22 MR. GLOSBAND: The first part of the colloquy dealt
23 with CNA objection --

24 MS. HELLER: Your name?

25 MR. GLOSBAND: My name is Daniel Glosband for CNA,

1 from Goodwin Procter. And, Mr. Freedman acknowledged that the
2 TDP's would be amended to resolve an ambiguity with respect to
3 the implications of the use of references to Sections 502(e)
4 and 509(c), and I simply wanted to say that no one has told us
5 how they intend to resolve it or what the ambiguity is going to
6 mean when it's been clarified, so we reserve our rights on that
7 issue pending seeing what they say.

8 MR. FREEDMAN: We understand that.

9 THE COURT: Okay.

10 MR. FREEDMAN: All right.

11 THE COURT: Is this an issue that's going to be put
12 back on the November 14th, whatever that is?

13 MR. FREEDMAN: Virtually all of these issues will be
14 back on that in the sense that the language of the disclosure
15 statement and the plan both will be amended and to the extent
16 that those amendments are filed before the hearing on the 14th,
17 people will obviously have a right to object to the amended
18 language.

19 THE COURT: Okay.

20 MR. FREEDMAN: Your Honor, the next issue relates to
21 some language in the plan that some of the objectors felt was
22 ambiguous with respect to the ability of the plan proponents to
23 amend the plan after the effective date. Now, the debtors --
24 or the plan proponents do not intend to provide for a license
25 to amend the plan that would exceed what's permitted under

1 Section 1127 and the language in the plan will be clear about
2 that.

3 That is not to say that some of the plan documents
4 don't, within their terms, contemplate the ability to amend it
5 by the parties to those documents going forward. For instance,
6 the TDP is a document that the trustees will have the ability
7 to provide for amendment on certain provisions, post
8 confirmation. That's all expressed on the terms of those
9 documents, but the underlying plan itself will clearly be
10 governed by the rules, in particular Section 1127 and we'll
11 amend the plan to be clear about that.

12 THE COURT: All right.

13 MR. FREEDMAN: And, those are General Unsecured
14 Creditors' Committee objections number 72 and Libby objection
15 number 32.

16 THE COURT: I'm sorry, and?

17 MR. FREEDMAN: Number 32, Libby objection number 32.

18 THE COURT: All right.

19 MR. FREEDMAN: The State of Montana, in objection
20 number 29 and Libby claimants in objection number 30, raised
21 the issue about the TDP not yet providing for an initial
22 payment percentage number. We understand that and the TDP will
23 be amended to provide for -- to address that issue.

24 THE COURT: Okay, when?

25 MR. FREEDMAN: Well, clearly before the disclosure

1 statement is approved, and we would expect to have that
2 amendment in time to address at the November 14th hearing.

3 THE COURT: Okay.

4 MR. FREEDMAN: Your Honor, CNA raised an objection,
5 number 107, that relates to the definition of settled insurance
6 companies, and the procedures that would be built into that
7 definition, to make clear how a current -- an insurance company
8 that has open coverage currently would be permitted to be
9 included within the definition of settled insurance companies
10 which is a group of insurance companies that get the benefit of
11 the Section 524(g) injunction.

12 We will be amending the plan to more clearly provide
13 for those procedures.

14 The ERISA claimants, Your Honor, filed a couple of
15 objections, number 88 and 121 which go to the issue of the
16 filing of the plan supplement. And the debtors are going to
17 amend the plan to provide that it would be filed within 10 days
18 prior to the confirmation date.

19 THE COURT: All right.

20 MR. FREEDMAN: Your Honor, the General Unsecured
21 Creditors' Committee --

22 THE COURT: Excuse me, Mr. Freedman, I'm sorry.
23 Before the start of the confirmation hearing, ten days before
24 the start of the confirmation hearing?

25 MR. FREEDMAN: Yes, confirmation hearing, I

1 apologize, I misspoke.

2 THE COURT: Okay.

3 MR. FREEDMAN: The General Unsecured Creditors'
4 Committee raised an objection on number 77 that went to the
5 inclusion in one of the release provisions of the plan, Section
6 8.8.8 of a reference to any third parties without going into
7 the implications of what that language meant. That language
8 will be deleted from the plan.

9 Excuse me, Your Honor. It's ten days before the
10 confirmation -- the plan supplement will be filed ten days
11 before the confirmation objection deadline. So, that it's even
12 more --

13 THE COURT: Okay. All right, thank you.

14 MR. FREEDMAN: The Property Damages Committee, the
15 Libby claimant, in objection number 12, the Libby claimants in
16 objection number 38 and the State of Montana in objection
17 number 28, objected to the situation that the plan has not
18 included some of the documents related to the treatment of
19 property damages claims and all of those documents will be
20 timely filed before the conclusion of the disclosure statement
21 hearing and in a way that will permit people to file objections
22 or raise any issues with respect to those documents, the way in
23 which the plan reads in the face of those documents and the
24 disclosure that's made with respect to that.

25 As the Court knows, the Future Claimants

1 Representative for property damages has just been appointed and
2 will have a voice in how those documents read, and the debtors
3 are in the process of addressing those issues.

4 THE COURT: All right.

5 MR. FREEDMAN: The debtors' plan -- excuse me, the
6 disclosure statement itself, does not include a reference to
7 Exhibit 19 or did not have attached to it Exhibit 19, which are
8 the list of retained causes of action. That will be filed
9 before the conclusion of the disclosure statement hearing and,
10 obviously, with appropriate notice and I would expect before
11 the hearing on the 14th.

12 Your Honor, a very significant issue that is actually
13 a solicitation issue but implicates other issues with respect
14 to the plan itself, has to do with the way in which the
15 debtors, or the plan will treat the right to vote of the
16 General Unsecured Creditors' Committee.

17 As the Court understands, I believe, the debtors
18 believe that that class, that is Class 9, general unsecured
19 creditors, will be not impaired by the plan. But, and in
20 particular, as a result of the amendment that the debtors have
21 agreed to make with respect to the USG procedures, the plan, in
22 the debtors' view, clearly provides that those claimants will
23 get all that they're entitled to under law, and thus fall
24 within the definition of non-impairment.

25 Having said that, the debtors have agreed to permit a

1 provisional vote, to solicit a provisional vote of Class 9 and
2 the general unsecured creditors have indicated that with the
3 debtors agreement to take that provisional vote as part of the
4 solicitation, the issue of whether or not Class 9 is impaired
5 will be deferred to the confirmation hearing.

6 THE COURT: Mr. Pasquale?

7 MR. PASQUALE: Ken Pasquale for the committee, Your
8 Honor. Yes, that's agreeable, so long as - we'll need to see,
9 of course, the form of ballot and the like, but yes, so long as
10 the class is voting, I don't see a distinction, however, Mr.
11 Freedman pointed out the USG type provision that's going to be
12 added for other unsecured creditors, it's one class, bank
13 claims and all other. So either the class is impaired or the
14 class is not impaired, but we do agree that that is an issue we
15 can argue at confirmation, so long as the vote is taken.

16 MR. COBB: Your Honor, Richard Cobb, on behalf of
17 certain bank lenders. Your Honor, I understand that is the
18 agreement between the bank lenders and the debtors.

19 THE COURT: Okay.

20 MR. FREEDMAN: Your Honor, just a housekeeping
21 matter, I neglected to point out to the Court that with respect
22 to the filing of Exhibit 9 that was raised by Kaneb, objection
23 number 42, with respect to the provisional vote. That
24 addresses objections by the U.S. Trustee, in item 13 by the
25 General Unsecured Creditors' Committee in item 115 and by Long

1 Acre in item 118.

2 We've already discussed the issue of amending the
3 plan with respect to, and really, and the solicitation program,
4 with respect to the deemed objections to employee claims. We
5 understand the Court's instructions on that. That is
6 implicated by General Unsecured Creditors' Committee objection
7 number 150.

8 THE COURT: Okay.

9 MR. FREEDMAN: And then finally, Your Honor, we have
10 filed Exhibits 5 and 6 to the plan. Those were filed on Friday
11 of last week. Excuse me, Thursday of last week, and over the
12 weekend -- Thursday we filed Exhibit 5, which is the list of
13 the settled insurance company and over the weekend with respect
14 to Exhibit 6, which is the insurance assignment agreement. A
15 number of objections were raised by insurance companies that
16 complained about the fact that those items were not filed and
17 we've now disposed of that.

18 THE COURT: All right.

19 MR. FREEDMAN: So, Your Honor, that covers the
20 package of matters which will require amendments to the plan or
21 the filing of additional -- which will involve either amending
22 the plan, amending the solicitation procedures, or filing some
23 additional documents that go to completing the plan.

24 I would also say that there are -- there still needs
25 to be filed the transactional documents between the debtors and

1 the personal injury trust, and those documents will be filed,
2 hopefully, by the commencement of the November 14th hearing.

3 THE COURT: Anyone have any comments with respect to
4 what Mr. Freedman has put on the record so far or -- good
5 morning.

6 MR. BROWN: Good morning, Your Honor, Michael Brown
7 for Seaton Insurance Company. Just one comment and we're
8 working with the debtor on this issue.

9 The Exhibit 5 that was recently filed has errors in
10 it. There is a policy from my client Seaton that was
11 originally described as being resolved under the old plan,
12 which is now listed as settled only as to products and my
13 understanding is that the debtor has deferred to Mr. Horkovich,
14 the insurance counsel for the committee to resolve that issue.

15 THE COURT: Okay.

16 MR. PERNICONE: May I be heard, too?

17 THE COURT: Ye, sir.

18 MR. PERNICONE: Carl Pernicone for Arrowwood
19 Indemnity, formerly known as Royal Indemnity Company. We're in
20 the same boat as Seaton. The settlement agreement that we had
21 reached with Grace 13 years ago with respect to these online
22 policies, our understanding for 13 years that it fully resolved
23 all coverage issues. This exhibits opens that and suggests
24 that it's a products only settlement. We vehemently disagree
25 with that and, obviously, we will be working to see what we can

1 do about that.

2 THE COURT: Okay. Well, I think to the extent that
3 there are those types of issues, hopefully between now and
4 November 14th, you're going to get them resolved, and if you
5 don't then, you know, we'll have issues.

6 MR. PERNICONE: That's our intention, Your Honor. We
7 only got it, really, one and a half business days before today,
8 so obviously, we're in no position to have a dialogue, but
9 that's the expectation.

10 THE COURT: Yes.

11 MR. PERNICONE: Thank you.

12 THE COURT: All right. Good morning.

13 MR. COHN: Good morning, Your Honor, Daniel Cohn, for
14 the Libby claimants. I really wanted to say a couple of words
15 about Exhibit 5, which is the list of settled insurance
16 companies.

17 This is one of the documents as to which there is an
18 unlimited ability to amend, apparently, without time limit and
19 we remain concerned about that. Obviously, if there are
20 typographical errors in policy numbers, that kind of thing, of
21 course, needs to be corrected and there needs to be a mechanism to
22 timely do so, but to the extent that insurance companies are
23 going to be added or subtracted or as in Mr. Pernicone's case,
24 for example, if there were going to be a change in the exhibit
25 as it relates to what coverages were deemed settled, a

1 substantive matter not merely a typographical error, there
2 would need to be adequate chance for all parties to respond,
3 especially the Libby claimants because what he's talking about
4 is coverage for Libby claims.

5 The other observation I wanted to make, Your Honor,
6 is that while Exhibit 5 is certainly helpful disclosure, we now
7 know who the settled insurance companies are, and what the
8 coverages are that are purported to be settled, there are
9 additional disclosure issues that we should talk about, whether
10 now or at some other appropriate point in the hearing, for
11 example, what consideration is being paid by the settled
12 insurance companies in exchange for the Section 524(g)
13 protection.

14 THE COURT: Well, I thought --

15 MR. FREEDMAN: Your Honor --

16 THE COURT: -- excuse me, I thought that Exhibit 5
17 was previously settled policies not to be settled policies.

18 MR. FREEDMAN: Exhibit 5 will --

19 MS. HELLER: Please use the microphone.

20 MR. FREEDMAN: Exhibit 5 will identify all the
21 settled insurance companies. So if a company makes a
22 settlement that is -- that permits it to be included within
23 Exhibit 5, that company would have that option. And I'm not
24 quite sure what Mr. Cohn is referring to about a need to know
25 the consideration.

1 THE COURT: Well, it has to be, if it's a settlement,
2 it's going to have to come before the Court. I'm not going to
3 permit the debtor to just add insurance policies to Exhibit 5
4 without bringing a 9019 motion.

5 MR. FREEDMAN: I think that that's everybody's --

6 MR. LOCKWOOD: I think that's everybody's
7 understanding. And if Mr. Cohn had some different
8 understanding, he's confused.

9 MR. FREEDMAN: Yes.

10 THE COURT: So, right now, my understanding is that
11 Exhibit 5, as of now, should only be already settled policies.
12 Is there something on it that's other than already settled
13 policies?

14 MR. FREEDMAN: Your Honor, I'll confirm this, but I
15 don't believe so. I don't believe that there's been any
16 settlement that hasn't, indeed, been brought before this Court.
17 I'm sure that if it was done post petition, it was brought
18 before the Court and if it was done prepetition, it was already
19 settled.

20 THE COURT: Right. So, it should --

21 MR. COHN: Your Honor, that's my understanding also.
22 I don't think that anything that's on there, that I know of, is
23 a newly settled insurance policy.

24 THE COURT: Okay.

25 MR. COHN: The distinction, the point I was getting

1 at, Your Honor, is that there may be some policies on there
2 that represent post petition settlements that were approved by
3 this Court. There are other companies listed on there,
4 apparently, and of course we have incomplete knowledge on this,
5 but apparently because they entered into settlements that were
6 long ago, prepetition settlements. And in the case of
7 prepetition settled policy, the question would be, what
8 consideration is being offered in terms of the funding of this
9 plan, in exchange for the Section 524(g) protection because
10 otherwise it would the Libby claimants position that an
11 insurance company is not entitled to the protection of a
12 Section 524(g) injunction without making a substantial
13 contribution to the plan. Not money that was turned over to
14 Grace years ago, and which Grace expended years ago on lord
15 knows what.

16 THE COURT: Oh, I see. You're contentions is that
17 Exhibit 5 is something more than just settled insurance
18 policies, it's settled insurance policies entitled to a 524(g)
19 injunction.

20 MR. COHN: That's the way it flows through the plan,
21 Your Honor.

22 MR. FREEDMAN: But, Your Honor --

23 MR. PERNICONE: Your Honor, may I be heard, too,
24 because they're talking about the Arrowwood policies. Carl
25 Pernicone, again, for Arrowwood Indemnity, formerly Royal

1 Indemnity.

2 The Zonolite policies that we're describing were
3 listed in 2004 by Grace as fully resolved policies. On
4 September 19th, when Grace filed its disclosure statement, I
5 think it's on Page 42, the text says that all of the primary
6 coverage including the primary Zonolite coverage, was fully
7 resolved, so our position is, that these policies aren't going
8 to be contributing anything to the trust because they're fully
9 settled.

10 THE COURT: Well, that may be, that may be, but Mr.
11 Cohn's point is, they may be fully settled, but having fully
12 settled doesn't get you a 524(g) injunction, it simply gets you
13 a settlement.

14 MR. PERNICONE: I understand that, but I wanted Your
15 Honor to understand that the change in position, this is in
16 2004, these were described as fully resolved policies, on
17 September 19th they were described as fully settled, now we're
18 changing something.

19 THE COURT: I understand.

20 MR. FREEDMAN: Your Honor, counsel is injecting into
21 this procedure something that has absolutely nothing to do with
22 what the Court is being asked to consider at this point.

23 MR. PERNICONE: I'm trying to inform the Court,
24 fully, about the nature of the settlements that were described
25 --

1 MR. FREEDMAN: We understand what counsel is trying
2 to inform the Court of, but the fact of the matter is, these
3 are quintessential plan confirmation issues --

4 THE COURT: They are but folks we are going to take
5 this up at plan confirmation if it's not resolved. So, a word
6 to the wise, get it fixed, one way or another, get it fixed
7 because this one will not be ducked for confirmation, it will
8 not be ducked. So, get it fixed, one way or another.

9 MR. PERNICONE: Thank you, Your Honor.

10 MR. COHN: Your Honor, the point about disclosure
11 here, which is what I understand we're primarily here for, is
12 simply that to the extent that there is -- well, whatever the
13 consideration is or was, for the settlement that entitles these
14 people to be listed on Exhibit 5, should be disclosed, so that
15 everybody knows what it is and can formulate, if necessary, the
16 appropriate confirmation objections.

17 THE COURT: Well, I don't think for disclosure
18 statement purposes the issue is how much the settlement was
19 prepetition. I mean, the debtor -- let me just pick a
20 hypothetical. Let's say a policy was settled in 1990, for
21 example, the debtor undoubtedly took those funds into its
22 general revenue stream at some point, used the funds for
23 whatever purpose they were used, what difference does it make
24 at this point if the settlement was a million dollars or \$20
25 million, it's gone.

1 MR. COHN: No, I -- Your Honor, it's not so much that
2 as that if there is going to be any new consideration offered
3 and maybe that just goes to your point of a few minutes ago
4 that any new settlement would need Court approval anyway.

5 THE COURT: Exactly.

6 MR. COHN: So, in that case, I think we have covered
7 the universe.

8 THE COURT: Right.

9 MR. COHN: Thank you.

10 THE COURT: Okay.

11 MR. FREEDMAN: Your Honor, just to be clear then,
12 because this issue does actually come up subsequently with
13 respect to some disclosure statement objections which we
14 believe the Libby claimants have made, which we believe should
15 be overruled, it is absolutely unnecessary in the debtors'
16 view, to go into the particulars of each of these prepetition
17 settlements in the disclosure statement and if Mr. Cohn or
18 somebody else has a problem with extending 524(g) relief to any
19 particular settled insurance company, under any theory, they
20 will be permitted to pursue their arguments at the confirmation
21 hearing.

22 THE COURT: And they'll get discovery, so just
23 understand, it's a discovery issue and if it takes time and it
24 defers the confirmation hearing because they need discovery,
25 that's going to be the consequence and I won't hear no

1 discovery on this issue because you're not going to disclose
2 it. So, you can't have the cake and eat it, too. That's going
3 to be the issue, folks. If you want a break for a few minutes
4 to discuss it, I'll let you confer with your litigation counsel
5 --

6 MR. LOCKWOOD: Your Honor, Your Honor --

7 THE COURT: Mr. Lockwood, I'm telling you, that's how
8 it's going to be.

9 MR. LOCKWOOD: They'll be informed, Mr. Cohn will be
10 informed. Mr. Cohn is trying to get, as Your Honor has
11 correctly identified, discovery in support of confirmation
12 objections.

13 THE COURT: Yes.

14 MR. LOCKWOOD: Okay. He has a legal position which
15 is, you've got to put new consideration in. The statute talks
16 about consideration on behalf of something. It will become
17 clear in the fullness of time, that Grace has indemnified many,
18 if not all of these companies from the earlier settlements. It
19 will become clear that Grace is taking the position and the
20 plan proponents have accepted the position that part of the
21 consideration that Grace is paying, is on behalf of companies
22 with which it has settled prepetition and indemnified because
23 it has an interest, a financial interest in not having
24 indemnity claims come back to Grace.

25 THE COURT: And it may very well.

1 MR. LOCKWOOD: That is not an issue for today, Your
2 Honor.

3 THE COURT: It's not.

4 MR. LOCKWOOD: And the insurers will be -- and Mr.
5 Cohn, will be told at an appropriate time, whether, if at all,
6 any new consideration is coming from these insurers. You are
7 correct, he's entitled to know it, but we don't have to put
8 every possible confirmation objection that Mr. Cohn
9 anticipates, in a disclosure statement in which he's the only
10 person that's interested in it. But it will be disclosed.

11 THE COURT: That was the only point, Mr. Lockwood.
12 All I said was, it's a discovery issue, and it is a discovery
13 issue.

14 MR. LOCKWOOD: We agree, Your Honor.

15 THE COURT: Okay, thank you.

16 MR. FREEDMAN: Your Honor --

17 THE COURT: What more Mr. --

18 MS. DeCRISTOFARO: Your Honor, I just wanted to make
19 clear that Exhibit 5 will have other issues raised, it seems to
20 be incomplete to a number of us who have settlements and things
21 and I just -- I'm not raising anything now, but I want to let
22 you know that there is a lot attendant to that listing.

23 MR. FREEDMAN: Your Honor, for the Court's
24 information, the debtors have reached out to all of the
25 insurance companies that have raised objections, and indicated

1 our desire to talk to them about their objections, and the
2 exhibits that have been filed and the debtors will be fully
3 cooperative in terms of addressing any problems that are
4 raised.

5 THE COURT: Mr. Freedman, in any every asbestos case
6 the equivalent of Exhibit 5 is always the subject of a lot of
7 negotiation from the time it's filed, until the plan
8 confirmation hearing, so I have no doubt the debtor is going to
9 be talking to a whole lot of folks about a lot of things on
10 Exhibit 5.

11 MR. FREEDMAN: Thank you.

12 THE COURT: Okay.

13 MR. FREEDMAN: Actually, I'd like to add that we've
14 also reached out to all the other objectors who have filed
15 objections to the disclosure statement in order to discuss with
16 them whether or not there are any changes that can be resolved
17 before the conclusion of the hearing.

18 THE COURT: All right.

19 MR. FREEDMAN: And we intend to be fully cooperative
20 on that. And I'd like to then turn to where we are --

21 THE COURT: One more.

22 MR. MONACO: One more. Good morning, again, Your
23 Honor, Frank Monaco for the State of Montana. Your Honor, the
24 proposed changes made by debtors' counsel are acceptable to the
25 State of Montana. There is, however, one, I hope is a

1 non-controversial change regarding language and accuracy.

2 Your Honor, we pointed out in our objection that at
3 Section 2.8.1.3, of the disclosure statement which discusses
4 the ORR decision, the debtors state that the Montana State
5 Supreme Court overruled the federal district court. If that
6 were true, we would be overturning longstanding principles of
7 federal preemption. I think they meant state district court,
8 and I would just ask that that be changed, to be accurate.

9 MR. FREEDMAN: Well, we'll correct any inaccuracy.

10 THE COURT: All right.

11 MR. FREEDMAN: If I could turn to a non-controversial
12 bit of housekeeping, just to make sure that it's on the record.

13 With respect to the objections that were filed by
14 insurance companies, based on the fact that the debtors had not
15 then filed Exhibits 5 and 6, those were objections number 45,
16 filed by Kaneb, which is not an insurance company, Maryland
17 Casualty number 46, Continental Casualty number 47, Zurich, 51,
18 Century Indemnity, 52 and Seaton Insurance, 54.

19 THE COURT: Okay.

20 MR. FREEDMAN: What I'd like to do now, Your Honor,
21 is start going through the various substantive objections to
22 the disclosure statement that were filed by various parties and
23 there are three categories that I'm going to cover in this
24 portion of the presentation.

25 First, those matters as to which the objector has

1 requested specific language and the debtors have agreed to
2 incorporate that language, I'll identify that for you.

3 Second, with respect to matters where the debtor
4 agrees that further disclosure is required, but the language
5 needs to be worked out, and finally, there are some that are
6 going to require more attention before the debtors can make a
7 decision whether it agrees that specific disclosure is
8 appropriate or not, and will identify what falls into that
9 category.

10 THE COURT: All right.

11 MR. FREEDMAN: So, I'll just start going through that
12 list, with the Court's indulgence.

13 The General Unsecured Creditors' Committee in item,
14 or in Section 3 of the chart, said that there are improper
15 disclosures or inaccurate disclosures with respect to the
16 claims of J.P. Morgan, one of the lenders and they have
17 provided us with proposed language which is identified on the
18 chart, that we have agreed to include. I can certainly read
19 the language into the record, but it's identified on the chart
20 and with the Court's indulgence, I'll just refer to that.

21 THE COURT: That's fine. Mr. Pasquale, do you need
22 the language read in?

23 MR. PASQUALE: No, not at all, Your Honor. Obviously
24 it's all subject to seeing it in the amended disclosure
25 statement but we appreciate the accepting of our language.

1 THE COURT: All right. That's fine.

2 MR. FREEDMAN: The General Unsecured Creditors'
3 Committee has also asked for certain language that's identified
4 in Section 1 of the chart, with respect to their position on
5 the plan, and that they are not a co-proponent to the plan,
6 we've agreed to accept that language. That's also identified
7 in the chart.

8 THE COURT: All right, that's fine, too.

9 MR. FREEDMAN: And then the committee, again, has
10 asked that there be a full disclosure and a more accurate
11 disclosure of the composition of the committee, and certain
12 other representatives of the committee and we have agreed to
13 that disclosure. That's under Section 4 of the chart.

14 And then with respect to the issues related to the
15 debtors' position that the lenders are not entitled to the full
16 rate of default interest that is provided in their agreements,
17 but a lesser rate, as provided in the plan, the General
18 Unsecured Committee has asked that there be certain disclosure
19 with respect to the existence of that dispute. That's
20 identified in Section 10 of the chart and we have agreed to the
21 language that identifies that dispute.

22 THE COURT: All right. Any need to put anything more
23 --

24 MR. PASQUALE: Well, Section 10 of the chart does not
25 have the actual language describing the litigation that we

1 propose. We understand that we will work with the debtors to
2 come to agreeable language with respect to the actual
3 description, but with that caveat, Your Honor, this is
4 acceptable.

5 THE COURT: Okay.

6 MR. FREEDMAN: The actual agreement, just to be
7 perfectly precise, as identified in our response on Section 10
8 of the chart, is a cross reference in Section 2.9.3.1 of the
9 disclosure statement to a new Section 3.2.8.4 of the disclosure
10 statement which we do need to spell out and work through with
11 the Creditors' Committee. But the cross reference language is
12 going to be included and we've agreed to the cross referencing.

13 THE COURT: Okay. That's fine.

14 MR. FREEDMAN: Now I'm going to turn to the matters
15 that are identified as being ones where the debtor has agreed
16 in principle to expand the disclosure, but has not yet actually
17 resolved the language.

18 The first one is the objection identified in Section
19 1 of the chart, that has to do with the treatment of -- the
20 position of the Creditors' Committee with respect to the
21 treatment under the plan of Class 9 claims, and the default
22 litigation. The Creditors' Committee, is of record, that they
23 disagree with the debtors' position about how we're going to
24 pay the lenders and the Creditors' Committee has indicated that
25 they believe that notwithstanding the changes that the debtors

1 have agreed to with respect to the treatment of Class 9 claims
2 that I previously discussed, nevertheless, Class 9 is still
3 impaired, and there will be appropriate disclosure of that
4 position of the Creditors' Committee in the disclosure
5 statement. That implicates objections identified as 1 and 5 on
6 the chart. Ken?

7 MR. PASQUALE: Yes, that's correct, Your Honor.
8 We'll work on language.

9 THE COURT: Okay.

10 MR. FREEDMAN: A similar objection is with respect to
11 number 8 of the chart. And, again, that involves language of
12 the Creditors' Committee's position regarding the treatment of
13 general unsecured claims, which is, they would like expanded
14 language in Section 4.3.1.9 of the disclosure statement. We've
15 agreed to work on that language.

16 THE COURT: I'm sorry, Section 8 in the extension of
17 time to object to claims? Am I looking at the right place?

18 MR. FREEDMAN: Your Honor, I may have put the wrong
19 --

20 THE COURT: I'm sorry, what section of the plan did
21 you refer to? I think I -- maybe I'm not looking at the same
22 -- I think it's 5 on the chart that I'm looking at.

23 MR. FREEDMAN: Okay. Your Honor, I apologize. The
24 reference in my notes was, unfortunately wrong, and what we're
25 going to do is to file a list of claims, as we indicated

1 before. We're going to file the list of claims as to which
2 they have no objection and to provide a deadline for filing
3 objections and rules about extending the deadline for objection
4 to general unsecured claims to which the committee objects. All
5 of those procedures will be laid out in both the disclosure
6 statement and plan amendments.

7 THE COURT: All right.

8 MR. FREEDMAN: And I apologize for the confusing
9 reference.

10 With respect to the issue of the employee claims
11 that's identified in Section 73 of the chart, the debtors will
12 revise the solicitation materials as the Court has instructed,
13 and there will be appropriate disclosure in the disclosure
14 statement.

15 The U.S. Trustee has asked for amended disclosure to
16 make clear that all pre-confirmation quarterly fees owed will
17 be paid on the effective date of the plan and that after the
18 effective date the debtor will file operating reports and pay
19 quarterly fees pursuant to the provision, the relevant
20 statutory provisions, until an order is entered closing the
21 case, disclosure will be provided on that.

22 THE COURT: Okay, what section is that, I'm sorry,
23 I've lost it? I had it, oh, 14?

24 MR. FREEDMAN: That is objection number 14, filed by
25 the United States Trustee.

1 THE COURT: 14, okay, thank you.

2 MR. FREEDMAN: The ERISA plaintiffs have identified
3 certain inaccuracies and a request for additional disclosure
4 which they think will provided better disclosure with respect
5 to the ERISA litigation. Those matters are identified in
6 Section 19 of the chart and we will be -- the debtors will be
7 providing appropriate disclosure to address those inaccuracies
8 and expand the disclosure.

9 THE COURT: All right.

10 MR. FREEDMAN: Those are the matters that the debtors
11 have agreed to make specific provision for, but the precise
12 language has not been agreed to.

13 THE COURT: Okay.

14 MR. FREEDMAN: Now, I'd like to turn to the group of
15 disclosure statement objections where the debtors -- where
16 objection is noted, the debtor is not prepared to agree that
17 appropriate disclosure is required, but needs some time to
18 consider the issue.

19 The Unsecured Creditors' Committee has asked that the
20 plan itself, or has indicated that they have a problem with the
21 fact that the plan itself does not provide a cash reserve for
22 the payment of general unsecured claims and that there be
23 corresponding disclosure with respect to that issue. That's
24 articulated in Section 9 of the chart, their objection is
25 identified in Section 9 of the chart and the debtors are

1 considering how to address that matter.

2 THE COURT: So, with respect to these, do you simply
3 want these deferred till November 14th, or do you want a ruling
4 on them today? I mean --

5 MR. FREEDMAN: Well, Your Honor, I'm simply trying to
6 put onto the record where we are on these and I'd be happy,
7 frankly, to just simply identify the particular matters that
8 are -- or the particular line items on the chart, without going
9 into detail of the substance, if the Court would prefer not to
10 have me stand up here and explain what the issue is. I'd be
11 happy to do it either way.

12 THE COURT: Well, I guess my question is this. I'm
13 willing to defer anything and everything that you want until
14 November 14th, it doesn't make any difference to me. The
15 problem is, if you haven't got everything resolved on November
16 14th and we then have a full blown disclosure statement hearing
17 and you need rulings because you haven't got everything
18 resolved, what happens if something is ruled against you and
19 you need more time to -- I don't know do further disclosures?

20 MR. FREEDMAN: Well, Your Honor, we think it's
21 helpful to just continue to work through identifying these
22 specific issues so that all the parties here are aware of what
23 the issues are and anybody can be heard on an appropriate
24 comment with respect to where we are right now, with respect to
25 these matters.

1 MR. BERNICK: We're cognizant, Your Honor, very
2 cognizant of the need to get these resolved promptly and the
3 fact that we have November 14. I think all we're doing at this
4 point is identifying for the Court what the status is of these
5 various matters that are, in fact, being deferred until
6 November the 14th.

7 THE COURT: Okay. That's fine.

8 MR. BERNICK: And I don't think that there's any -- I
9 mean, given the volume of paper that's come through, it's
10 obviously a logistical problem just to get to closure on some
11 of these things, even though as you can see that in many, many
12 instances we should be able to resolve the matter with
13 appropriate language.

14 THE COURT: All right.

15 MR. BERNICK: So, I think this is where we are.

16 THE COURT: Okay.

17 MR. FREEDMAN: So, with the Court's indulgence, I'll
18 continue.

19 THE COURT: One second. Mr. Brown?

20 (Counsel speaking among themselves)

21 MR. FREEDMAN: Your Honor, to be clear about what I'm
22 doing right now, I'm first going through the items that fall
23 into this category of pending and subject to consideration
24 which do not relate to insurance companies. The second part of
25 this will be to just identify the ones that relate to the

1 insurance companies issues.

2 THE COURT: All right.

3 MR. FREEDMAN: The Official Committee of Unsecured
4 Creditors has indicated in Section 11 of the chart that there
5 is inadequate -- or has stated in Section 11 of the chart that
6 there is inadequate information to determine issues related to
7 the principal and interest components of Class 9 claims. That
8 information, or relevant information is provided in the plan,
9 they think that there is a need for expanded disclosure, the
10 debtor is considering whether or not that expanded disclosure
11 is appropriate.

12 A number of claimants who would fall within the
13 category of indirect trust claims, which is a category of
14 claims that would be channeled to the personal injury trust,
15 under the channeling injunction, have indicated that there
16 needs to be more expanded disclosure with respect to how that
17 works, what the mechanism is under the plan and what the plan
18 actually defines as an indirect trust claim, and the debtors
19 are putting together appropriate disclosure to address those
20 objections. Those objections have been filed by Bank of
21 America, number 15, Scotts, number 20, BNSF number 25, and the
22 State of Montana, number 21.

23 THE COURT: Okay. Just a minute, Mr. Freedman.

24 MR. RAMOS: Good morning, Your Honor, Marcos Ramos,
25 Richards, Layton and Finger on behalf of Bank of America.

1 Obviously, when Bank of America filed its objection
2 it had a lot of questions, I don't believe that even when we
3 filed our objection the trust distribution agreement had been
4 filed. We have even more questions since we've been looking at
5 that document, so we look forward to discussions with counsel
6 regarding many questions we have as to how we fit within the
7 mechanisms that are set out in those agreements, or whether we
8 do. Thank you.

9 MR. FREEDMAN: Your Honor, for the record, the trust
10 distribution agreement -- trust distribution procedures were
11 filed on September 19th with the plan and disclosure statement,
12 but that's not to say that counsels need to have time to
13 examine those issues isn't appropriate, but the TDP was filed
14 when we filed the plan.

15 THE COURT: Okay. I expect that since the debtor is
16 indicating that it intends to try to get these things together,
17 that any party who has not yet worked language out with the
18 debtor should be back in touch with the debtor. What Mr.
19 Freedman just said is that the debtor is working on language to
20 explain this mechanism, so maybe a time frame, Mr. Freedman, if
21 you can give one, to Bank of America, Scotts, BNSF and Montana,
22 since they're particularly interested in this might be helpful
23 so they know when they can maybe expect something?

24 MR. FREEDMAN: Your Honor, I would expect that by the
25 end of this week we could get to some language that would at

1 least have a consensus with among the plan proponents and then
2 circulate to those folks.

3 THE COURT: Okay, so by the end of the week, so
4 hopefully, next week you folks will have a chance to start
5 looking at this and the get back in touch with the debtor and
6 plan proponents to see what you can negotiate for some
7 acceptable language in the disclosure statement.

8 All right, Ms. Cobb?

9 MS. COBB: That's fine. Your Honor, I just wanted to
10 make clear that we --

11 MS. HELLER: Please use the microphone.

12 MS. COBB: Sorry, I just want to make clear that we
13 preserve any rights to further object because we haven't had an
14 opportunity to, obviously, evaluate or hear what that proposal
15 is.

16 THE COURT: Everybody's rights are preserved. This
17 is only a preliminary, the debtor hasn't even resolved these
18 objections and I'm not making any rulings because the debtor is
19 only indicating that it hasn't even decided whether it's going
20 to expand the disclosure statement. So, I'm obviously, not
21 making any rulings, I haven't even heard from the debtor yet
22 whether the debtor is going to attempt to consensually resolve
23 these, but as to this one, Mr. Freedman has made a statement,
24 the debtor is working on language and going to circulate
25 something. Mr. Wisler?

1 MR. WISLER: Thank you, Your Honor, on behalf of
2 Maryland Casualty Company, we filed a reply to some of these
3 issues raised by Scotts and BNSF and I'd just ask counsel if
4 everybody was going to get that language and I'm not sure the
5 answer to that, but I think we will get that.

6 MR. FREEDMAN: Clearly, Maryland Casualty will get
7 that language. Everybody who has raised an objection that goes
8 to this issue, Maryland Casualty and frankly, anybody else who
9 requests affirmatively that they'd like to see it, we'll be
10 happy to share it with them.

11 THE COURT: All right. Okay, Mr. Freedman, thank
12 you.

13 MR. FREEDMAN: All right. Scotts, in objections
14 number 22 and 23, have raised issues with respect to the
15 disclosure about the effect of confirmation on the declaratory
16 judgment actions and Scotts' claims. The debtors are
17 considering how to address that language and I can't tell the
18 Court that we have agreed that further disclosure is required,
19 but we'd be pleased to talk with Scotts directly about what
20 they'd like to see and see if we can come to some further
21 disclosure that would make them happy about that.

22 THE COURT: Okay. Ms. Cobb?

23 MS. COBB: What was described -- okay. That was a
24 little bit different than my discussions earlier. As long as
25 we're going to have a dialogue and some proposed language,

1 we'll just wait to see what that leads us to.

2 THE COURT: Okay.

3 MS. COBB: Thanks.

4 MR. BROWN: Your Honor, on that same point, there are
5 a number of insurers that are also parties to that DJ, we'd
6 like to be included in that dialogue.

7 THE COURT: All right.

8 MR. FREEDMAN: Your Honor, it may make more sense at
9 this point, given the nature of these objections, to maybe try
10 and shortcut it a little bit by simply identifying the
11 sections of the chart as to which we have intended to provided
12 additional disclosure or to consider whether or not additional
13 disclosure, not get into so much granularity, if you will,
14 about what that disclosure would involve, and the folks can at
15 least be aware that if they have an interest in that section,
16 we're working on it and would like to talk with them and it
17 might move things along a bit.

18 THE COURT: Yes, I think that would be helpful. If
19 I'm not making rulings, in my view, they're all continued to
20 November 14th, you folks will either work it out, or I'll hear
21 whatever objections are filed on November 14th. You know, if
22 the debtor adds language and everybody is happy with it, there
23 wont be additional disclosure statement objections and if
24 people aren't happy with whatever has happened, the debtor will
25 let me know and I'll hear them on November 14th. So, I think

1 if you just identify the sections, that would be fine.

2

3 MR. FREEDMAN: Okay. Well, Your Honor, what we are
4 considering, the particular line items on the chart that we are
5 considering and the objectors that are relevant to those line
6 items are Seaton Insurance Company's objection noted on line
7 53, the Libby claimants objection noted on line 37, and also on
8 39. Kaneb's objections, on line items 40, 41, 43 and 44, and
9 as to Kaneb's Your Honor, I'm pleased to say that we're
10 actually exchanging language right now, so we've made some
11 progress in terms of moving things along with Kaneb.

12 THE COURT: All right.

13 MR. FREEDMAN: So, Your Honor, I think the Court will
14 find, if you've been checking boxes off on the chart, Ms. Baer
15 has been doing it, that we've actually made quite a bit of
16 progress in terms of identifying where we're going to be with
17 much of what's in the disclosure statement.

18 As I said, there are two remaining, excuse me, Your
19 Honor, I did want to mention also that on the same vein we do
20 have some insurance objections that we are considering and,
21 again, without getting specific, those are Continental
22 Casualty, number 49, Fireman's Fund, number 60, 63, 65, 66, 67,
23 68 and 69. We would be pleased to engage with those two
24 insurance companies in a discussion about appropriate further
25 disclosure and we are considering whether or not as to all of

1 those items, that any further disclosure is required.

2 THE COURT: Okay.

3 MR. FREEDMAN: Now, having said that, again, where we
4 are is that we have gone through objections that are going to
5 be addressed by amendments, or further filings, and by matters
6 as to which the debtor is either accepting language, we'll work
7 on language, but accepted the concept of principle, or is
8 considering it and working with the claimant or desires working
9 with the objector, to resolve the issue.

10 Two other categories of disclosure statement are
11 relevant at this point, and then finally we do have some
12 objections related to the solicitation procedures which we
13 should also take up today.

14 With respect to the disclosure statement, there are
15 numerous objections that were raised as disclosure statement
16 objections that are actually confirmation objections and those
17 matters the debtor believes should entirely be deferred until
18 the confirmation hearing. Mr. Bernick will be presenting the
19 debtors' views about that.

20 We thought it would be appropriate to get through
21 that discussion at this point and then after that, turn back to
22 some remaining cats and dogs, if you will, objections in the
23 disclosure statement that are ones which the debtors believe
24 the Court could overrule today. And we would raise those but
25 it would make sense to have all the proceeding discussion

1 worked through before we get to those last bunch of disclosure
2 statement objections.

3 THE COURT: All right. Why don't we take a five
4 minute recess and then we'll start with the plan objections.
5 Okay.

6 (Recess in proceedings)

7 THE COURT: It looks like everyone is back, Mr.
8 Bernick, whenever you're ready.

9 MR. BERNICK: Your Honor, we have, and I think we
10 have a handout --

11 THE COURT: Thank you.

12 MR. BERNICK: By way of trying to expedite the
13 process of going through this category, this category is
14 comprised of all of the disclosure statement objections which
15 we believe are properly considered to be confirmation
16 objections and, therefore, should be taken up at that time
17 rather than in connection with the disclosure statement
18 approval.

19 And so, what this chart does, essentially, is to go
20 through and group all of the different items that appear on
21 your chart, according to what the overall objection is, so
22 that, for example, with respect to impairment, we have that as
23 number one, we then list the objecting parties and then the
24 corresponding numbers. So, it's a similar cross reference to
25 what it is that Mr. Freedman gave orally.

1 THE COURT: Excuse me, Mr. Bernick. Mona, you may
2 want to get a copy of what they're handing out, it'll be easier
3 for you to follow. Get a copy of what they're handing out.

4 MR. BERNICK: Sure.

5 THE COURT: Thank you. I'm sorry, Mr. Bernick, go
6 ahead.

7 MR. BERNICK: No problem. The first on the list is
8 impairment, the second is the absolute priority rule and I'm
9 going to take those up together because they essentially are
10 very, very closely tied together.

11 With respect to impairment, there are really two
12 different aspects of impairment that have been raised. There's
13 first of all voting impairment, that is whether people are
14 given the opportunity to vote or not, and the secondly,
15 impairment in connection with plan treatment, and that, of
16 course, ultimately also prompts consideration of the absolute
17 priority rule objection.

18 On the first, which is voting for impairment of
19 voting rights, that claim and that objection, as Mr. Freedman
20 recited, we've agreed to give a provisional vote to Class 9 and
21 people who have objected on grounds that they didn't have a
22 right to vote are all in Class 9 and that should have the
23 effective of mooted the objection, that is, they're going to
24 get the right to vote.

25 With respect to plan impairment, the absolute

1 priority rule, the situation there is somewhat different.
2 While the issue of impairment is deferred to plan confirmation
3 in the sense of whether the determination of the post petition
4 interests will constitute an impairment or not. That, as a
5 technical matter, can be deferred, but we want to be clear that
6 the absolute priority rule is a live issue, that's been fully
7 briefed and submitted to the Court for a decision, insofar as
8 the Class 9 lenders are concerned. So, nothing that appears in
9 our responses and our position today is designed to defer the
10 Court's determination of the impact of the absolute priority
11 rule because it's implicated by the fundamental question raised
12 by our objection to post petition interest which is whether
13 such post petition interest, there's an entitlement to post
14 petition interest.

15 As Your Honor is very, very well familiar, as a
16 result of the briefing that's occurred, it is our view that
17 there is no entitlement to post petition interest beyond what
18 we have put in the plan and to the extent that post petition
19 interest implicates or is tied to the solvency issue, that
20 gives rise under a line of cases to application of the fair and
21 equitable standards.

22 So, by raising the issue in our objection of whether
23 Class 9 bank lenders are entitled, as a matter of law t o get
24 post petition interest and if so, at what amount, we have
25 necessarily brought into the process, into that briefing

1 process, the impact, if any, of the absolute priority rule and
2 the impact, if any, of the fair and equitable standard and we
3 intend -- we are asking the Court, we have asked the Court to
4 resolve that issue now, precisely because it is so important to
5 the plan process and we're not withdrawing that, that remains a
6 live issue.

7 MR. PASQUALE: Your Honor, excuse me, just a simple
8 question. Before you were asking for responses in turn, are
9 you going to do that here or should we just at the end --

10 THE COURT: I think we'll do them in -- yes, because
11 I think it'll be easier to track my notes if we do them in
12 turn. Yes.

13 MR. BERNICK: Yes. And if you'd give me a moment, I
14 will finish and then you can -- I would expect that you would
15 stand up and respond.

16 Now, this relates, all that I've said relates to the
17 Class 9 lenders. With respect to the balance of Class 9 which
18 includes trade creditors, we do ask that the issue of plan
19 impairment and the absolute priority rule be deferred until
20 confirmation, indeed, with respect to the non-lender Class 9
21 claimants. We have agreed to follow the USG procedure for the
22 determination of what, if any, post petition interest they're
23 entitled to, so that is not a live issue now.

24 The other objector with respect to the absolute
25 priority rule was the State of Montana and then also the Crown.

1 With respect to those, we understand that as a result of the
2 determination that was made in Canada, that the Class 6 -- or
3 excuse me, the issue that's been raised, the objection that's
4 been raised by the Crown, has effectively been decided.

5 With respect to the State of Montana, they raise an
6 absolute priority rule issue and they are, obviously because
7 they're part of Class 6, not Class 9, it remains to be seen
8 whether their issue will really have any potential impact at
9 all, because if Class 6 is an accepting class, we don't have to
10 address the question of whether there's an absolute priority
11 rule problem with respect to the State of Montana.

12 So, to review, we believe that the impairment for
13 voting purposes is a moot issue because the provisional vote
14 has been given to Class 9, with respect to plan impairment and
15 the absolute priority rule, the Class 9 lenders, that issue has
16 already been joined and it's before the Court. With respect to
17 trade debt, or to the non-Class 9 lenders, creditors, not
18 included in the lenders, but still part of Class 9, we believe
19 that that should be deferred in the State of Montana, which is
20 part of Class 6, we believe that impairment of the -- I'm
21 sorry, the absolute priority rule there as well, should be
22 deferred pending the vote.

23 THE COURT: Mr. Pasquale?

24 MR. PASQUALE: Thank you, Your Honor. I think at the
25 end I agree with where Mr. Bernick ended up, but it's in the

1 niceties leading to that, that I disagree.

2 Impairment is a confirmation issue so long as the
3 vote is taken. We've heard that, there will be a provisional
4 vote taken of all of Class 9, bank lenders and what is labeled
5 other unsecured creditors within Class 9.

6 That does not moot the issue. It defers it for
7 confirmation but the issue is live, it is not a moot issue.
8 Adopting procedures like the USG procedure, again, is something
9 that we have been asking the debtors to do for quite some time.
10 We need to see what that language is, but again that doesn't
11 resolve the impairment issue with respect to Class 9. Class 9
12 includes that group that will be subject to those provisions as
13 well as a group of lenders that are not subject, is not subject
14 to those provisions.

15 THE COURT: Wait, I'm sorry, you lost me.

16 MR. PASQUALE: Okay. The USG type procedures --

17 THE COURT: Oh.

18 MR. PASQUALE: -- would only apply to the other
19 unsecured creditors.

20 THE COURT: Right.

21 MR. PASQUALE: Okay. Mr. Bernick said that adopting
22 those procedures takes care of the impairment issue with
23 respect to those creditors. Well, impairment doesn't work that
24 way. Impairment works with respect to the class. The class as
25 a whole, it is our position, remains impaired. That's an

1 argument we're perfectly happy to defer to a confirmation. I
2 just wanted to be clear that whatever these procedures are, are
3 not going to take away that issue.

4 As far as what is before the Court on the litigation
5 involving the lenders, we believe impairment is not directly
6 addressed in those papers. To the extent it is, it's simply in
7 the context of a claim objection brought by the debtors.
8 Again, I don't think and Your Honor will make that
9 determination when she looks at that, but at the end of the day
10 absolute priority and impairment are confirmation issues and we
11 do expect to litigate and argue those issues at that time.

12 THE COURT: Okay.

13 MR. PASQUALE: Thank you, Your Honor.

14 MR. COBB: Your Honor, Richard Cobb, on behalf of
15 certain bank lenders. Your Honor, I concur with Mr. Pasquale's
16 comments. I agree with Mr. Bernick to the extent that there
17 has been some preliminary settlement reached with regard to
18 voting impairment and we have to work out some language, but we
19 agree that that issue, for purposes of disclosure statement,
20 the disclosure statement hearing today, that has been, or may
21 be resolved depending on when we see the language, and dot the
22 I's and cross the T's. But with regard to plan impairment, the
23 absolute priority rule, the Court is not going to issue any
24 ruling today with regard to those issues. Those issues are
25 deferred until plan confirmation and at that time we'll address

1 those issues and Mr. Bernick, I'm sure, will argue that that is
2 already before the Court, and the bank lenders disagree, that's
3 not a today issue and the Court is not being asked, I believe,
4 to make any ruling with regard to what's considered, you know,
5 before the Court today and what's not on those two issues.

6 I agree -- that was my reaction, Your Honor, when I
7 heard Mr. Bernick's description with regard to, you know,
8 something is pending before the Court with regard to impairment
9 and absolute priority, and something needs to be addressed at
10 plan confirmation. It's very simple, Your Honor. Voting
11 impairment is being dealt with in the disclosure statement
12 context, in a settlement. The plan impairment will be dealt
13 with at plan confirmation, as well as the absolute priority
14 rule issues.

15 MR. BERNICK: When Mr. Cobb started out on point one,
16 which is voting impairment, I said, I agree with that and I
17 disagree with what Mr. Pasquale said, but when he got to the
18 absolute priority rule, I said, no, no, no, I disagree with
19 that and I agree with what Mr. -- I think that in terms of the
20 ultimate result, we're probably all in the same place.

21 When I distinguished and said voting impairment, I
22 meant purely whether we're going to take a vote or not. And as
23 Mr. Cobb recognizes, that issue is resolved in principle, we
24 are going to take the vote and I agree with him that if there
25 are -- God knows if there are language and detail issues, I'm

1 sure they will be raised and resolved, but I don't think the
2 Court has to address impairment for voting purposes in the
3 sense of whether a vote will be taken because we've agreed to
4 do that.

5 With respect to the absolute priority rule in
6 impairment for confirmation purposes, in a way this is a little
7 bit premature because we have to get to confirmation and then
8 we have to see what Your Honor does with respect to the matters
9 that are before the Court and to the extent that we're trying
10 to address now what impact, if any, Your Honor's determination
11 of those pending matters that are still active before the
12 Court, everyone agrees they're active before the Court,
13 everyone wants the Court to resolve them, determine their
14 impact however they're resolved on confirmation, is for another
15 day. However, there's no question but that both the impairment
16 and absolute priority rules and laws have specifically been
17 teed up for decision in the context of the question of whether
18 the bank lenders are entitled to receive post petition
19 interest.

20 It may be that ultimate confirmation is technically
21 and procedurally a different stage of the case, but there's
22 something called estoppel or res judicata. If Your Honor,
23 indeed, does address those matters, as I believe, and I think
24 that everybody agrees, that you must address those matters in
25 determining whether there's an entitlement to post petition

1 interest beyond what's in the plan, those matters will, in
2 fact, have been resolved.

3 So, all that we're saying today is that all of what
4 has been placed before Your Honor, in connection with the
5 litigation of the post petition interest is actively before
6 Your Honor, we're hoping and expecting that Your Honor will
7 issue a decision. What impact that decision will have
8 ultimately on the confirmation of the plan, I suppose we can
9 argue about at another time, but we don't want the -- what we
10 do want is to have those matters that have been put before Your
11 Honor resolved by Your Honor now as opposed to later on.

12 I don't know if that confuses things, helps things,
13 but that's why we're coming up and stating the position that we
14 are.

15 THE COURT: Well, my view of the world was that it
16 ought to be resolved in conjunction with the plan confirmation
17 because I think it's an issue that not necessarily drives
18 confirmation but is an issue that goes more toward an
19 entitlement under the plan to what the plan provides by way of
20 a distribution than anything else. I guess I'm going to have
21 to go back and look at the papers and see what --

22 MR. BERNICK: Well, it -- you know, maybe that would
23 be appropriate. The reason that we teed it up and Your Honor,
24 and I will dust off a little bit of memory here, because this
25 has happened relatively quickly and for a reason. The term

1 sheet made certain provisions regarding the payment of post
2 petition interest.

3 THE COURT: Right.

4 MR. BERNICK: We, because of the letter that we
5 received determined that we had no choice that if we wanted to
6 keep this plan together, we needed to get a determination
7 earlier rather than later, as to whether we or they were right
8 about post petition interest. So, we objected and Teed up the
9 issue, by way of objection in allowance and disallowance.

10 However, the case law in examining the issue of
11 whether there is, in effect, an exception to 502, for a solvent
12 debtor, looks at that in terms of fair and equitable treatment
13 and the other side raised the issue of the absolute priority
14 rule. Well, we didn't raise the issue of the absolute priority
15 rule, they raised the issue of the absolute priority rule.

16 So, at this point, both as a function of the case law
17 which was effectively a gloss on a 502, and as a function of an
18 issue that the other side has raised, now have two principles
19 of law, that generally get taken up in connection with
20 confirmation, now raised before the Court in connection with
21 the issue of whether there is entitlement under the law to
22 these things.

23 And, in the course of that briefing, one of the
24 things, one of the issues that was raised by the bank lenders,
25 was, well, why do we have to resolve this now? And that was --

1 there was a little bit of schizophrenia on that because the
2 bank lenders said, why do we have to resolve it now but, in
3 fact, the committee said, we should resolve it now. And then
4 we went through a whole process of saying, can we resolve it
5 now, when we haven't had a full estimation and that, itself,
6 was litigated.

7 So, for all those reasons that have already been put
8 before the Court, we believe that it A, can be resolved now, B,
9 should be resolved now and, C, there's no reason that it, by
10 law, cannot be resolved now.

11 Your Honor can take up, even at this time, the
12 application of confirmation principles, particularly when it
13 presents an issue that has been, that is so important to get
14 resolved. There's no further record that's going to be before
15 the Court with respect to the vote on this issue, we know what
16 their vote is going to be. So, this is one of these situations
17 where, yeah, we're at a disclosure statement hearing, and yet
18 there's a confirmation issue that's fairly ripe but it's not
19 the fact of being a disclosure that has prompted this to be
20 raised now. It was because it's so important to the plan and
21 they made evident their disagreement with it right away, that
22 we wanted to raise it early on.

23 So, for all those reasons, while it is always within
24 the Court's discretion about whether to take it up now or later
25 on, for all of the reasons that we've previously indicated, we

1 think it's critical to take it up now and our agreement to
2 provide a vote, a provisional vote, was not designed to cause
3 people to say, oh, well, now it's all deferred. The agreement
4 to give a vote was to say, we can go ahead and take the vote if
5 Your Honor -- that way Your Honor's determination of the issue
6 that's been briefed doesn't have to hold out or hold up the
7 disclosure statement approval and the voting process. But
8 that's not to say that we then want to have that issue float
9 all the way down the road, we can't. It's a very expensive
10 issue and it's one that's important for us.

11 And I know, having now agreed partly with both sides
12 and then made a speech, that Mr. Pasquale, I'm sure, will have
13 something further to say as well as Mr. Cobb --

14 MR. PASQUALE: Ken Pasquale for the committee and Mr.
15 Bernick is right. Since we argued this for four hours in
16 Delaware, Your Honor --

17 THE COURT: I don't need a re-argument, I simply --

18 MR. PASQUALE: Yes, and I'm not looking for -- that's
19 exactly what I was trying to avoid. Let me just remind the
20 Court, we are not asking to defer it, but I think when Your
21 Honor looks back at the papers, you'll see it's in a context of
22 an abstract plan. The debtors started that contested matter as
23 a claim objection, it was always litigated as a claim
24 objection. There is no plan in the context of the papers that
25 were filed, the plan was not filed until days before the

1 hearing.

2 MR. BERNICK: Your Honor, that is really --

3 MR. PASQUALE: Check the date --

4 MR. BERNICK: -- it was specifically, Your Honor, it
5 specifically said, file the plan, make sure they have it. The
6 plan was filed, it was filed, I think even before their last
7 papers were due, I'm not sure about that, but it was certainly
8 filed before the argument took place.

9 MR. PASQUALE: You know what, we can submit the dates
10 to Your Honor, it's just days before the oral argument, not in
11 time for any of the papers.

12 THE COURT: Folks, gentlemen, it has been very
13 cordial in this courtroom up til now, I haven't had to threaten
14 the toothbrush for a long time, let's not get there now. Mr.
15 Cobb.

16 MR. COBB: Your Honor, very simple. The debtors'
17 objection and the responses are before the Court, for such --
18 Your Honor will either decide them between now and confirmation
19 or you will not. You've heard arguments in the papers as to
20 why they should be decided before confirmation, you've heard
21 arguments as to why it should be deferred.

22 I don't understand why we spent ten minutes here
23 having this long discussion, but I think that clarifies where
24 we're at. For voting purposes, we're resolved, subject to
25 language. For plan confirmation purposes, you'll either

1 resolve it and if you do resolve it, Your Honor, we may suggest
2 that well, you didn't get all of it, and so we do need to
3 address solvency, or something else in the plan. But that's a
4 fight we will have down the road. We don't need to take up the
5 parties' time today, discussing this issue any further, in my
6 opinion.

7 THE COURT: Mr. Monaco?

8 MR. MONACO: Good morning, again, Your Honor. My
9 co-counsel, Jacqueline Dais-Visca would like to address the
10 Court with respect to the Crown's objection.

11 THE COURT: All right.

12 MR. MONACO: Thank you.

13 THE COURT: Good morning.

14 MS. DAIS-VISCA: Good morning, Your Honor. The
15 claimants filed an -- pardon me?

16 MS. HELLER: State your name for the record.

17 MS. DAIS-VISCA: Last name, Dais-Visca, D-a-i-s
18 hyphen, V, as in Victor i-s-c-a. First name Jacqueline.

19 The Crown filed an objection in these proceedings.
20 Subsequent to filing that objection, Mr. Justice Morowitz of
21 the Ontario Superior Court acting under the CCAA, released his
22 reasons for a decision as well as the order approving the
23 Canadian settlement. In the context of his reasons he did two
24 things that are of import for the purposes of the outstanding
25 objection from the Crown. The first was, he approved the

1 settlement and in so doing, he recognized that the Canadian
2 representative counsel had authority to negotiate on behalf of
3 the Crown, and the second thing he did was, recognize a CCAA
4 release in favor of the Crown for any of the Crown claims
5 seeking contribution and indemnity from Grace.

6 As a result of that, our objection is effectively
7 moot now. We are no longer able to appear before you as we now
8 are represented by the Canadian representative counsel. There
9 is an appeal period of 15 days, under the Ontario rules.
10 Subject to the expiration of that appeal period, it would look
11 like the Crown's participation in these proceedings, apart from
12 any claims that may be filed against the Canadian PD fund in
13 Canada, would appear to be at an end.

14 THE COURT: All right. And when does that expire,
15 and does the Crown know whether it's going to appeal?

16 MS. DAIS-VISCA: The Crown will not be seeking leave
17 to appeal, it's a leave to appeal procedures and we have not
18 heard from the plaintiff as to whether or not -- the
19 representative counsel, as to whether or not they will be
20 appealing, but that 15 day period should be expiring, the
21 Monday, two weeks ago from Friday, so the 2nd, week of
22 November, some time. But a decision, the actual reasons were
23 released on the Friday, and the decision itself was released on
24 the Monday. So we have another week or so.

25 THE COURT: Okay. Thank you very much.

1 MS. DAIS-VISCA: Thank you.

2 MR. MONACO: Good morning, again, Your Honor, Frank
3 Monaco for the State of Montana.

4 Your Honor, I know the Court is painfully familiar
5 with the background of our matter and I will not burden the
6 record with providing more background, but our primary concern
7 is how our contribution indemnification claims are being
8 treated under the plan and while we realize that the crux of
9 our objections are, essentially plan objections, we do believe,
10 however, that it is important to the reader of the disclosure
11 statement that they understand the significance of these
12 disputes because they could render the plan un-confirmable.

13 Your Honor, with respect to the absolute priority
14 rule, just so the Court is aware, from our position, the plan
15 classifies our contribution indemnification claims as Class 6
16 asbestos personal injury claims, which are impaired under the
17 plan. We are on par with the Class 7 asbestos PD claims and
18 the Class 9 general unsecured claims which are unimpaired under
19 the plan.

20 Also, Your Honor, the Class 11 equity interest in
21 non-parent debtors are unimpaired. And, I think Your Honor,
22 it's important that the disclosure statement reveal that if
23 Class 6 rejects this plan, that it will be rendered
24 un-confirmable as a result of the absolute priority rule.

25 Your Honor, I think it is a risk factor which the

1 debtor is required to disclose in a disclosure statement and
2 certainly a very, very important issue and I really don't
3 understand why the debtor will not put language in the
4 disclosure statement to discuss this issue, state our position
5 and state their position. The disclosure statement is already
6 150 pages, I don't see where a few more paragraphs or pages are
7 going to matter in the scale of things.

8 So, that's our position on the absolute priority
9 rule, Your Honor. We think there should be some language, that
10 we're happy to work out with the debtor, that discusses this
11 issue. Thank you. Happy to answer any questions Your Honor
12 has.

13 THE COURT: Okay. Mr. Bernick?

14 MR. BERNICK: Yes. That's actually a different issue
15 than the one that I addressed, that's a question of what the
16 disclosure statement says, and I'll address that in a moment,
17 but the matters that I came up to address are whether the Court
18 needs to resolve the absolute priority rule as a substantive
19 matter at this point in time.

20 I take it from counsel's remarks the State of Montana
21 agrees that the issue does not have to be resolved at this time.
22 I think that that's -- I'm reading that right, although I
23 haven't heard it from Mr. Monaco.

24 THE COURT: I think that's what he's saying, yes.
25 His issue is whether or not the fact that there's a risk factor

1 in the event that Class 6 rejects the plan, should be disclosed
2 in the disclosure statement and I think what I heard Mr.
3 Freedman say earlier, but I'm not positive now, is that that
4 was one of the issues that the debtor was going to talk about,
5 but I guess I have to go back --

6 MR. BERNICK: It may well -- I mean, you know from --

7 THE COURT: No, I'm not sure. I don't think that is
8 one of the issues that I have to --

9 MR. BERNICK: From our point of view, I mean, any
10 number of different potential implications that will flow from
11 different people's legal positions, we can always say well, it
12 is the position of the objectors that X, Y and Z, that position
13 is based upon X, Y and Z, if turns out to be true, it has A, B,
14 C consequences, I think that that really is in the nature of a
15 legal, not legal speculation, but it's not a factual matter.
16 And, therefore, I don't -- I'll defer to Mr. Freedman, but I
17 don't know why we would seek to pick out this particular
18 objection to trace through the legal consequences of it.

19 Be that as it may, Mr. Freedman is going to address
20 that issue and all that I'm up here to say is, and I think Mr.
21 Monaco agrees, that the absolute priority rule in terms of the
22 State of Montana's objection, is a matter for confirmation.

23 MR. MONACO: I agree, Your Honor, that it is a plan
24 confirmation issue, however, the debtor has a section in its
25 disclosure statement which deals with risk factors, one of them

1 is confirmability of the plan, I think this is a significant
2 issue that should be discussed and disclosed.

3 And I really don't understand why the debtor is
4 willing to, or at least consider putting in language dealing
5 with our issue on classification under the 524(g) trust and not
6 this issue. I don't understand the distinction of why they're
7 reluctant to do so.

8 MR. BERNICK: A risk factor, Your Honor, is something
9 that pertains to one, if, in fact, the plan is adopted what
10 risks will adhere to the claimant in terms of the treatment
11 that they're actually going to be afforded. There are -- if
12 you wanted to list as a risk factor all the different legal
13 issues that might arise between now and the time of plan
14 confirmation, we could go through an encyclopedia of all those,
15 we could submit all the briefs and basically say, gee, we'll
16 read all the briefs, these are all a bunch of issues.

17 THE COURT: I think this is one that could be --

18 MR. BERNICK: But I --

19 THE COURT: -- addressed quite easily in the
20 disclosure statement, frankly, and it may not be worth worrying
21 about, by simply adding a sentence that indicates that in the
22 event that an impaired class does not vote in favor of the plan
23 and the plan is un-confirmable, then there are consequences,
24 one of which is, either the debtor has to file a plan that is
25 confirmable or the case has to be dismissed or the case has to

1 be converted. I mean --

2 MR. LOCKWOOD: Your Honor, in Section 9.2.3 of the
3 disclosure statement has an explicit paragraph on this subject.

4 THE COURT: 9. --

5 MR. LOCKWOOD: 9.2.3 on Page 129 of the disclosure
6 statement.

7 MR. BERNICK: Is it specific to these folks or --

8 THE COURT: Okay.

9 MR. LOCKWOOD: It's specific -- the possibility of
10 getting the vote of an impaired class or not, and having a
11 problem with 1129, if you don't get it, it doesn't mention
12 Montana. I grant you that. And it doesn't mention Montana's
13 specific contention as such, but I believe if Your Honor looks
14 at this paragraph, you will see that it adequately discloses
15 the risk of not getting a vote. That's correct, as Mr. Monaco
16 just observed, it's generic.

17 MR. MONACO: Your Honor, as we stated in our
18 objection, the problem with that provision and we did cit to it
19 in our objection, it's generic. We think that the disclosure
20 statement should go a step further and actually outline the
21 specific issues I've just stated on the record. I don't talk
22 about adding a couple more sentences. This is more than
23 hypothetical, this is something the debtors are proposing, that
24 if they don't get Class 6 to accept this plan will not be
25 confirmable.

1 MR. BERNICK: But that's true with -- I think that
2 Your Honor gave some language, it turns out that Mr. Lockwood
3 was prescient, and we have a paragraph, we'll rest on that.

4 THE COURT: But this isn't the only impaired class in
5 the plan and that's -- I mean, what you're stating, I think,
6 Mr. Monaco is true with respect to every impaired class. The
7 debtor only needs on impaired class to vote and then it's in
8 cram down, I agree, but the issue is whether or not the debtor
9 can cram down the plan as to any impaired class as long as it
10 has one that votes and the debtors' plan has impaired classes
11 other than Class 6.

12 So, why is this language not sufficient as to
13 impaired classes, plural? I mean, the issue is to state what
14 classes are impaired, doesn't the ballot -- isn't the ballot
15 going to essentially be delivered to impaired classes?

16 MR. MONACO: Yes, Your Honor, but I think that we
17 are pointing out that this is specific to Class 6.

18 THE COURT: Yes.

19 MR. MONACO: And that if Class 6 doesn't accept, then
20 the plan will be un-confirmable. I don't understand why the
21 debtor can't specifically point out this issue.

22 THE COURT: Why would it -- why can the plan not be
23 crammed down against Class 6 if it could be crammed down
24 against any other impaired class? I mean, the debtor has a
25 burden of proof to meet.

1 MR. MONACO: Well, it's my understanding if Class 6
2 rejects, it's un-confirmable, you haven't met the standards for
3 confirmability. Even if there is some other unimpaired class.

4 THE COURT: Okay. Well, isn't that a plan
5 confirmation issue?

6 MR. MONACO: It is, Your Honor, but again, it's our
7 position this should be stated clearly in risk factors.

8 THE COURT: Okay.

9 MR. BERNICK: This is so perplexing, Your Honor, too.
10 I confess to be nothing, a bankruptcy lawyer, is why it's kind
11 of protesteth too much. Why is it so critical in this regard,
12 to have this particular language put in there. I mean,
13 attempting to say, sure we'll put it in because we can stop
14 arguing about it. You kind of wonder, though, what the purpose
15 of it really is at the end of the day.

16 We all know that with respect to the indirect
17 claimants, they're pretty much already participating actively
18 in the case, it's not as if the disclosure is going to wake
19 them up to something. And with respect to Class 6 in terms of
20 the direct claimants, they're co-proponents of the plan.

21 You know, I'd like to say, let's just stop it and
22 we'll put it in, but then God knows, I'm probably going to hear
23 in the course of the next 24 hours, that all kinds of other
24 people want to have the same type of stuff put in. And at a
25 certain point it becomes unproductive.

1 THE COURT: Well, I think -- the only thing that I
2 can see at this point, is that that's a plan confirmation
3 issue. If I'm missing something and, in fact, this plan is
4 absolutely un-confirmable if Class 6 rejects the plan, then I
5 think you folks need to talk about some language. If it's
6 simply an issue of cram down, then it's an issue of cram down
7 and I think the language that's there is sufficient.

8 MR. LOCKWOOD: Your Honor, I hate to have to say
9 this, but I have to. It is -- the plan proponents differ on
10 this issue. As you will recall, Mr. Bernick's original plan
11 had a deemed unimpairment of Class 6.

12 THE COURT: It did.

13 MR. LOCKWOOD: And it would have deemed it to have
14 accepted and we had a position that said, that doesn't work
15 with the 524(g) requirement or the 75 percent vote is absolute.
16 We have agreed as part of this compromise that we aren't going
17 to litigate with one another the question of whether or not
18 what I think Mr. Monaco is really saying is right, i.e.,
19 whether there is or is not an absolute 75 percent vote
20 requirement regardless of deeming and regardless of any other
21 kind of arguments that somebody might make.

22 So, what Mr. Monaco is, in effect, asking Your Honor
23 to do is to rule, I would like this, frankly, this is why I
24 hate to get up and say this, I would love Your Honor to say,
25 the 75 percent vote requirement is absolute, you can't cram

1 down.

2 But that happens to be a residual unresolved issue
3 which the debtors might, in fact, want to reup, depending upon
4 how the confirmation proceeding goes, it's a little hard to see
5 how you could do it in terms of a compromised plan as opposed
6 to reverting back and having an estimation, which would really
7 be the original predicate for that argument. But, I don't see
8 why we have to get into that debate when we've got a section
9 that says, if you don't get the vote, you may not get the plan
10 confirmed, because that's all we're really saying at the end of
11 the day to the voters.

12 THE COURT: And I still think that's sufficient
13 because if you don't get the vote, the debtor still has
14 options, including redoing the plan, or moving for a dismissal
15 or converting the case and if that's what you need to add into
16 that section, fine, add a couple of sentences as to what the
17 legal consequences are, basically that you're going to go back
18 to square one, somehow, or square 25 in this case.

19 MR. BERNICK: Yes. This is -- and this is what
20 bothers me a little bit, just in terms of our process. If
21 we're going to have to go through these kinds of things with
22 all the different constituencies here, it creates a real
23 logistical issue whereas the substance of it, I mean to be able
24 to say, which is I think, probably, what we would end up
25 saying, that if the vote is not in favor of the plan in Class

1 6, and cram down does not take place, then this plan cannot be
2 confirmed is almost tautological but we can go ahead and state
3 that but then how many other tautologies are we going to have
4 to state in connection with this process?

5 THE COURT: I don't know.

6 MR. BERNICK: So, we'll go do that one, and we'll
7 see, I guess, what happens.

8 THE COURT: Okay.

9 MR. BERNICK: Okay. Third party releases is the next
10 category and this includes the question of the scope of the
11 exculpation clause and as Your Honor can see from the chart
12 there is a series of objecting parties, the U.S. Trustee, the
13 ERISA plaintiffs, the Libby claimants, Kaneb, and I can't
14 figure out whether that's Caneb or Kaneb, and Fireman's Fund, I
15 have a question mark on that, I don't even know what that
16 exactly means, I think that there are essentially three issues
17 that get bound up in this category.

18 One is the availability of a third party release,
19 absent consent, called the availability for a non-consensual
20 third party release. And, incorporated in that is the question
21 of whether people should be given the opportunity to
22 affirmatively opt in.

23 Second issue is the scope of the third party release
24 in terms of what third parties are picked up in the release.

25 And the third is the scope of the exculpation clause.

1 Now, the scope of the exculpation clause is something that
2 doesn't really bear upon voting and, therefore, is plainly a
3 confirmation issue.

4 The second, and that was the third one that I
5 mentioned. The second one, which is the scope of the third
6 party release in terms of what third parties are picked up.
7 This is a matter that's raised by the Libby claimants, they
8 raise the question of whether the scope of the third party
9 release that's proposed is consistent or inconsistent with the
10 categories that are set forth in 524(g).

11 Again, that's something that's plainly a confirmation
12 issue. We can seek to negotiate, further refine, or basically
13 see if we're at an impasse with respect to what third parties
14 should be picked up. But that, again, is a confirmation issue.

15 The issue of whether, in fact, third party releases
16 are available absent the affirmative consent of the creditors
17 does pose a voting issue to the extent that Your Honor would
18 consider that you have to provide for an opt in, which
19 essentially is a way of saying that the creditors or claimants
20 must affirmatively decide that they're agreeing, which means
21 that it must be consensual. And that, therefore, would have
22 some relevance and ripeness today.

23 But it is our position that at the end of the day
24 non-consensual releases are appropriate and we're prepared to
25 litigate the issue, that is whether non-consensual releases are

1 appropriate at the time of confirmation as if there is no
2 voting opportunity. That is, that we're prepared to take that
3 issue on squarely in connection with confirmation, whether a
4 non-consensual release is appropriate.

5 We think that as that issue gets litigated if, in
6 fact, it is litigated at the time of confirmation, it will be
7 different in terms of its application to the asbestos claimants
8 versus the non-asbestos claimants. With respect to the
9 asbestos claimants, obviously 524(g), we believe, states a
10 principle that does not require the acquiescence of all of the
11 different asbestos claimants, that's why it's got the voting
12 requirement of 75 percent. So, we think it's a non-issue with
13 respect to 524(g), with respect to asbestos.

14 With respect to non-asbestos claimants, we think that
15 that issue does not, obviously, implicate 524(g). Because it
16 doesn't implicate 524(g), it doesn't implicate the CE decision
17 which says that 524(g) is exhaustive with respect to asbestos
18 matters, it therefore, has to be decided outside the context of
19 CE, Combustion Engineering. At that point, then have to deal
20 with the Continental decision of the Third Circuit and as we
21 know, Continental left open the question of whether
22 non-consensual third party releases could be appropriate, said
23 it was not going to decide that issue as a general proposition
24 and, in fact, in the footnote that was associated with that
25 discussion, gave specific recognition to the fact that it might

1 be that a different and special rule is appropriate in the case
2 of mass torts, because you'll recall that both the Johns
3 Manville decision out of the Second Circuit, Fourth Circuit's
4 decision in A.H. Robbins, as well as the Dow-Corning decision
5 out of the Sixth Circuit, all provide for and approve
6 non-consensual third party releases in mass tort. So, we would
7 be arguing that those same principles should be adopted with
8 respect to the non-asbestos claims and for a very simple
9 reason, which is, if you don't do it, you get the squeaky wheel
10 problem. In fact, in the Dow-Corning case, it was, I think,
11 all of 50 claimants in the entire case that held up the
12 ultimate confirmation of the Dow-Corning case for a number of
13 years. The Sixth Circuit ultimately ruled that they didn't
14 have the ability to do that. The third party releases would be
15 good, even as to them, even though they were not -- they didn't
16 vote in favor of, indeed, objected to the confirmation of that
17 plan.

18 But what happens under 524(g), what happens with
19 respect to non-asbestos claims and Continental is an issue for
20 another day, we're prepared to address that issue without the
21 benefit of an opted provision and, therefore, we would say that
22 that issue, too, should be deferred until the time of
23 confirmation.

24 THE COURT: Well, what are the releases as to the
25 non-asbestos claims that the debtor is trying to get and for

1 whom?

2 MR. BERNICK: I would have to go through, Your Honor,
3 I'm not actually prepared to do that, I'm sure that Mr.
4 Freedman could, the specific language of those different
5 releases. They're non-asbestos and they seek to cover -- well,
6 maybe, Ted if you could address that, that would be fine.

7 MR. FREEDMAN: The provision that relates to this
8 discussion is Section 8.8.7 of the plan and what that provision
9 essentially provides is that a creditor who votes for the plan
10 or takes property under the plan will be deemed to give a
11 release to a number of constituencies, those being the asbestos
12 insurance parties, the asbestos insurance entities, the
13 Unsecured Creditors' Committee, the Asbestos PI Committee, the
14 Asbestos PD Committee, the Equity Committee, Asbestos PI FCR,
15 the Asbestos PE FCR, and each parties' representatives with
16 respect to essentially any matters involving Grace. And that's
17 what the releases involve. That it's for people that vote for
18 the plan and people that accept assets under it.

19 THE COURT: Okay.

20 MR. BERNICK: I don't know if anybody had --

21 THE COURT: Mr. Cohn.

22 MR. COHN: Yes, Your Honor. Let me start off by just
23 addressing this distinction between disclosure statement
24 issues, and plan confirmation issues. We've objected to a
25 whole slew of provisions of the plan. They are plan

1 confirmation issues, Your Honor. They will surely need to be
2 addressed at the time of plan confirmation. However, there is
3 lots of case law out there that says that just as a matter of
4 judicial economy one ought not to go through a very expensive
5 and time-consuming solicitation process if the plan is really
6 going to be dead on arrival by reason of certain of its
7 provisions. And so I think what we might do today, and that's
8 productive, would be to identify whether there are any of those
9 types of provisions here. We have objected on a number of
10 grounds to the scope of the releases and the exculpations and
11 the injunctions. And I do not propose to go through all of
12 that right now, but I would like to identify two provisions
13 which I think are just blatantly -- render the plan blatantly
14 unconfirmable, which I think this Court ought appropriately to
15 take up right now.

16 One of those is the provision that Mr. Freedman just
17 read. The key words are -- we all understand that one can --
18 that one can say if you vote in favor of the plan, you're given
19 the release. What this provision does is it goes beyond that,
20 and it says that even if you voted against the plan, if you
21 accept any consideration pursuant to the plan, then you are
22 giving a release as a creditor.

23 Judge Walrath in the Zenith decision went through
24 that very issue and has said as a matter of law that you can't
25 -- unless you vote in favor of the plan, you can't require

1 somebody to be providing a release of third parties. That's
2 just a clear issue of law. The debtors have overreached -- the
3 plan proponents, I should say, really overreached. Worse yet,
4 they've done it in a self-dealing kind of context, because the
5 -- among the beneficiaries are the Asbestos Claimants Committee
6 as a co-proponent of the plan. So what they're basically
7 saying is the Libby claimants, even if they vote against the
8 plan, are providing a release. Here's a release of whatever
9 claims we may have against you.

10 I understand separate issue, Your Honor. Maybe they
11 get there anyway under an exculpation clause, but it is clearly
12 -- you clearly cannot say that simply by getting --

13 THE COURT: I think you're right, Mr. Cohn. I think
14 you and the U.S. Trustee are right on this one. I don't think
15 just by taking property under the plan you can require someone
16 to give a release. I think it's a voting issue, and if you
17 vote against the plan, you're clearly not giving a release. I
18 think it's a confirmation and disclosure issue, and this one
19 has to be changed. It simply has to be changed. And I agree
20 with Judge Walrath. I think -- I don't think Continental goes
21 this far, and I think it simply has to be changed.

22 MR. FREEDMAN: To clarify the Court's ruling, is the
23 Court saying that the language that needs to be changed is the
24 taking of property under the plan?

25 THE COURT: Yes. Yes, you -- I think you can vote,

1 you know, for -- if you vote for the plan, I think you can
2 provide the release, although I think the U.S. Trustee's Office
3 is correct that it should be an opt in. But where it is --
4 where you can combine this with an exculpation provision, why
5 don't you just do it that way? The law in the Third Circuit's
6 pretty clear that you can do it as an exculpation provision
7 where it's the professionals and the committees and the Future
8 Claims Rep that that is what you're trying to protect. Those
9 are the entities you're trying to protect, so why don't you do
10 it as an exculpation provision rather than release?

11 MR. BERNICK: But, Your Honor, I --

12 THE COURT: Because they're not providing
13 consideration. You're going to have a contract issue if you
14 don't do it as an opt in with a special provision on the ballot
15 in this Circuit. So why don't you just do it as an exculpation
16 provision?

17 MR. BERNICK: We'd be happy to do that, but we're
18 talking here about the Libby claimants. The Libby claimants
19 are asbestos claimants.

20 THE COURT: Yes, they are.

21 MR. BERNICK: The asbestos claimants, if they get out
22 voted under 524(g) -- 524(g) is dispositive. It's not a
23 Continental issue at all. We're talking about Continental
24 would have application --

25 THE COURT: I don't --

1 MR. BERNICK: -- in the case of a non-asbestos claim.

2 THE COURT: Yes.

3 MR. BERNICK: 524(g) contemplates specifically that
4 the squeaky wheel can't upset the plan.

5 THE COURT: I don't -- I still don't think that you
6 can force someone who votes against the plan to provide
7 release. By virtue of the fact that they take property under
8 the plan, you are forcing them to give a release. I don't
9 think that's appropriate in a voting context.

10 MR. BERNICK: They don't have the ability to resist
11 the release that flows from 524(g), period.

12 THE COURT: Oh, they don't. Under 524(g) I agree.

13 MR. BERNICK: Well, that's the whole --

14 THE COURT: It's a 75 percent vote.

15 MR. BERNICK: That's the whole -- that's the whole --
16 again there will be a more interesting question with respect to
17 the non-asbestos claimants.

18 THE COURT: I thought that that's what we're talking
19 about.

20 MR. BERNICK: No. No. No. Mr. Cohn is representing
21 the asbestos -- the Libby asbestos claimants.

22 THE COURT: 524(g) has its own provisions that the --
23 that the statute builds in. That's the 75 percent vote.
24 There's nothing that you can do about the language of 524(g).
25 There's a substantial contribution issue that is much different

1 from the Continental standard. I apologize.

2 MR. BERNICK: Yes, so --

3 THE COURT: I thought you were talking about -- I
4 thought you were rising, Mr. Cohn, in response to the release
5 provisions under the Continental standards not under 524(g).
6 The Court can't do anything about the statutory provision of
7 524(g).

8 MR. BERNICK: Right, and that's why with respect to
9 the people who are under 524(g) the issue doesn't go to dead on
10 arrival for the plan. It goes to whether we have exceeded the
11 scope of 524(g) in the language that we have provided. That's
12 a confirmation issue, but it doesn't go to the question of
13 whether the plan, in fact, can be -- you know, is dead on
14 arrival, because we got people who are non-consensual people.

15 Non-asbestos claimants is a different proposition.,
16 but with respect to the non-asbestos claimants, we're not
17 talking about -- we're not talking about 524(g). There we're
18 talking about Continental --

19 THE COURT: Well --

20 MR. BERNICK: -- and under those circumstances I
21 think you get the issue of whether Continental actually
22 forecloses this. And we don't believe that it does, but that's
23 not Mr. Cohn's clients. He represents PI claimants.

24 THE COURT: You're talk -- I would prefer to put it
25 in these terms. I don't know that the nature of the claim

1 governs. I think the provision of the plan that is either a
2 524(g) injunction versus a different type of injunction is the
3 standard that would govern. And, Mr. Cohn, it seems to me that
4 if there's an issue under 524(g) that hasn't yet been briefed
5 or decided somewhere, I'll treat it as a confirmation issue not
6 a disclosure statement issue. To the extent that it's a
7 Continental issue though, that issue I think the plan has to be
8 modified to take out the acceptance of property, because I
9 think Judge Walrath is quite correct in the Zenith case as to
10 that issue. But for 524(g) purposes I think -- Congress has
11 been very clear that certain entities -- certain entities who
12 make substantial contributions to the plan are entitled to
13 particular types of injunctions, but those entities are not
14 going to encompass the professionals who work for the
15 committees, the committees, the FCR, and so forth. They will
16 not be entitled to a 524(g) injunction.

17 MR. COHN: Well, first of all, Your Honor, the
18 provision that we're talking about, I'm sorry, is a release not
19 an injunction? Everything you've said about injunctions I
20 agree with. We obviously have issues about the scope of the
21 injunction. I'm not raising those as we stand here.

22 THE COURT: Okay. Well, 524(g) --

23 MR. COHN: The issue is purely --

24 THE COURT: -- doesn't provide a release. It
25 provides an injunction.

1 MR. COHN: Exactly, and what they have done in the
2 plan -- the specific provision that we're talking about is not
3 the injunction provision under 524(g). It is a purported
4 release. It says that if you accept property --

5 THE COURT: Show me the language that we're talking
6 about, so that I'm sure we're talking the same paragraph,
7 because now you've confused me. Is --

8 MR. COHN: Sure, Your Honor. It is --

9 THE COURT: 8.8.7?

10 MR. COHN: 8.8.7.

11 THE COURT: Okay. We're back to 8.8.7. It's the
12 same one Mr. Freedman talked about. This is simply saying,
13 "Without limiting any other provisions of the plan, each holder
14 of a claim or equity interest who votes in favor of this plan
15 or receives or retains any property under the plan shall be
16 deemed to unconditionally have released the asbestos protected
17 parties." That goes -- that is too broad. Whether -- this is
18 not a 524(g) injunction issue. This is saying that simply
19 because you get property under the plan, you've provided a
20 release to, among others, the asbestos protected parties.
21 524(g) doesn't provide a release. It provides an injunction.
22 So I'm back to what I said before. This provision is too
23 broad, and, in my view, it's unconfirmable. So, Mr. Cohn, I
24 agree with you.

25 MR. COHN: Thank you, Your Honor.

1 MR. BERNICK: Well, I want to confer with Mr.
2 Freedman on this, and we may be back to the Court, but I
3 understand what Your Honor is saying.

4 THE COURT: Okay. It's simply the or retains any
5 property that I'm concerned about.

6 MR. BERNICK: I understand that.

7 THE COURT: Okay.

8 MR. COHN: I'm sorry. There was one other issue.

9 MR. BERNICK: Sure.

10 MR. COHN: The other issue, Your Honor, you might
11 recall that throughout this case you've heard reference to the
12 independent claims that the Libby claimants have against
13 parties such as the State of Montana and others and without --
14 and including -- including Maryland Casualty Company, but not
15 in its role as the debtors' insurer but rather based on its own
16 independent torts. And in some cases you have seen fit to
17 enjoin our pursuit of those claims during the case, and others
18 you've ruled that you have no jurisdiction to do it.

19 But I mention all this only by way of background to
20 just focus you on those independent claims. It is clear that
21 those independent claims cannot be enjoined under Section
22 524(g). Section 524(g), as you've just recited, is limited by
23 its terms to those four categories of people who can receive
24 the protection of an injunction, and those four categories of
25 claims that can be protected do not include any independent

1 claim that -- of the type that the -- that the Libby claimants
2 have against the State of Montana, against Maryland Casualty
3 Company, and so on.

4 And we would respectfully submit that apart from all
5 other issues concerning 524(g) injunctions, this one is clear.
6 No one, you might recall, Your Honor, when we had discussions
7 about this Court's jurisdiction to issue the preliminary
8 injunction, nobody contended that they would have the right to
9 get a final injunction or a plan injunction against those
10 claims. It was totally a matter of what was going to be done
11 during the Chapter 11 case. So given the fact that this is
12 really an uncontested and uncontestable interpretation of
13 Section 524(g), there's just no reason why they should be
14 permitted to go out and solicit acceptances of a plan that
15 contains language that goes well beyond this. And we quote the
16 language in our papers, Your Honor, but if you wanted to look
17 at a section of the plan, Section 8.2.1, which is the
18 channeling injunction?

19 MR. LOCKWOOD: Your Honor, we were talking about
20 third party releases here. I can't understand where Mr. Cohn
21 -- he seems to be talking about the scope of the 524(g)
22 injunction, which --

23 MR. COHN: This is the second -- the second issue as
24 to which I've said the plan is blatantly unconfirmable.

25 MR. LOCKWOOD: So, in other --

1 MR. COHN: It is a different issue from the releases.

2 MR. LOCKWOOD: So, in other words, Mr. Cohn has sort
3 of taken over the order of presentation and is going to decide
4 which issues we're going to talk about as plan confirmation
5 issues? I mean Mr. Bernick hasn't addressed this issue at this
6 point.

7 MR. COHN: I'm sorry, Your Honor. I didn't see a
8 separate entry for injunction issues on Mr. Bernick's chart,
9 and so I thought this was the appropriate place. I'm happy to
10 do it at some later point if that was what you had in mind, Mr.
11 Bernick.

12 THE COURT: Well, I --

13 MR. COHN: I realize the importance of keeping this
14 record --

15 THE COURT: Okay. At the moment let -- I'm into this
16 now. Let's finish this issue. But after this, yes, let's
17 finish Mr. Bernick's trend, but I don't want to have to back up
18 to this now. So what is this about the channeling injunction,
19 Mr. Cohn?

20 MR. COHN: Section 8. --

21 THE COURT: I'm there.

22 MR. COHN: -- 8.2.1.

23 THE COURT: Yes.

24 MR. COHN: All right. If you look at the language,
25 it says, "All present and future holders of asbestos PI

1 claims." And, by the way, this starts -- if you'll hang on
2 just a second, Your Honor? Because we quoted the except in our
3 papers, and I'm just -- I just want to make sure that I get
4 this correctly in context.

5 (Pause)

6 MR. BERNICK: Which page of your brief?

7 MR. LOCKWOOD: Which page of your brief are you
8 talking about, Mr. Cohen? I mean I'm having trouble following
9 where you're coming from.

10 MR. COHN: Page 82.

11 THE COURT: I'm not certain why whatever this is
12 isn't related to a confirmation issue, Mr. Cohn.

13 MR. COHN: It is. It's because it -- it's because
14 the language goes so clearly and uncontestedly beyond anything
15 that you could do under Section 524(g). It just ought to be
16 pruned back, ought to be clarified. It says basically, Your
17 Honor, that anybody -- if you have a claim against any --

18 MR. LOCKWOOD: Your Honor --

19 MR. COHN: -- any --

20 MR. LOCKWOOD: Your Honor, I can interject something.
21 This is -- he's pointed out an ambiguity that we're going to
22 have to address. I really -- now that he's given me the point
23 in his brief that he's talking about, we -- the plan proponents
24 have actually not had a chance to -- I think what he's doing is
25 reading in some language here that if you parse through the

1 definitions, it's -- it doesn't mean what he says it does, but
2 it's conceivable that we might have a language fix on this. I
3 don't know -- I mean we're certainly not in a position to
4 accept his characterization of what this language says, because
5 what he's saying is that this language says that anybody that
6 has an asbestos PI claim is enjoined from suing everybody in
7 the universe not limiting it to asbestos protected parties.
8 And that's clearly not what it's intended to do, and I think if
9 we parse the language very closely, I think that we could
10 conclude that it doesn't do that, but I will defer to the
11 debtors, but I really don't --

12 THE COURT: All right. Get together and work on a
13 fix.

14 MR. COHN: Yes, Your Honor, that's what I was going
15 to suggest. Shall we put this over --

16 THE COURT: Yes.

17 MR. COHN: -- to the November 14th --

18 THE COURT: Yes.

19 MR. COHN: -- hearing?

20 MR. BERNICK: I'm sorry. Mr. Cohn has not only put
21 an issue before the Court that wasn't encompassed by the point
22 that we were making and a confirmation issue, but he's now
23 said, well, we're going to resolve this on November the 14th.
24 This is -- plainly goes to the scope of the injunction that is
25 plainly a confirmation issue. We'll take a look at it, as Mr.

1 Lockwood said, but the idea that this is actually now
2 appropriate for resolution in the context of November the 14th,
3 I don't know whether that really is appropriate. It's not that
4 we're going to delay it, but it seems that Mr. Cohn is angling,
5 angling, angling to have this matter be a confirmation issue
6 that actually is taken up in connection with the disclosure
7 statement process. And, again, what is the need for this?
8 We're talking about fine tuning the scope of the injunction.

9 THE COURT: Well, Mr. Cohn's position is that the
10 plan is unconfirmable, because it's the asbestos channeling
11 injunction is too broad, and then it encompasses parties who
12 would not be entitled to the scope of the injunction, because
13 it encompasses direct claims that would be those direct claims
14 by parties who were not subject to the scope of the injunction,
15 i.e., the ZAI plaintiffs whose direct claims against, for
16 example, Maryland Casualty would be encompassed within the
17 scope, and, therefore, the scope is too broad. I think if you
18 folks talk about it, if it's a language issue, you'll get it
19 fixed, so just talk.

20 MR. BERNICK: We will do that, Your Honor, but this
21 is not a confirmation issue that --

22 THE COURT: It is a confirmation issue.

23 MR. BERNICK: I mean it is a confirmation issue.
24 It's not a confirmation issue that ultimately undercuts all the
25 underpinnings of the plan such that we're going down a path by

1 sending this plan out for vote fruitlessly. This deals with
2 what the scope of the injunction is. It is a confirmation
3 issue. It's precisely not the kind of confirmation issue that
4 says we shouldn't go forward with the vote, because it doesn't
5 go to the fundamental underlying question of whether the plan
6 is viable.

7 THE COURT: Okay.

8 MR. BERNICK: It's a fine tuning issue. That's all
9 that I'm saying.

10 THE COURT: Fine. Work on the language.

11 MR. COHN: I shall work with the plan proponents,
12 Your Honor.

13 THE COURT: All right. Mr. Fornari.

14 MR. FORNARI: Your Honor, Joseph Fornari on behalf of
15 the United States Trustee. At the risk of pushing on an open
16 door, I'd like a clarification, if I could, on the Court's
17 ruling. As I understand it, the Court has sustained the
18 objection of the United States Trustee, which was premised on
19 In Re: Zenith and In re: Continental Airlines, and has now
20 required that the plan proponents amend the disclosure
21 statement in conformity with your ruling and also to include in
22 the ballot form a specific affirmative opt-in provision.

23 THE COURT: Well, what I required is that this
24 language in 8.8.7 that requires the or retains any property be
25 deleted, because I believe that the language of the plan is

1 unconfirmable. I don't think you can force a release of this
2 nature on someone who may have voted against the plan, but,
3 nonetheless, because the class has voted affirmatively in favor
4 of the plan has received property under the plan. So I don't
5 think that's appropriate. I do agree with the U.S. Trustee's
6 position that in order to give a release of certain types, that
7 a vote in favor -- affirmative vote in favor should be
8 required, but I've also asked the debtors why, when this is the
9 nature of the release that they're attempting to get, they
10 don't do it by way of an exculpation instead of release, which
11 would, I think, moot this whole concept out at least as to the
12 professionals, the Committee, the Future Claims Rep, and so
13 forth. I think as to the asbestos protected parties though,
14 they do need an affirmative vote, because as to those, under
15 the -- for the non-asbestos claimants who would be releasing
16 asbestos parties, I think that does take an affirmative vote if
17 it's going to, in fact, be a release under Continental I think
18 in this Circuit. And then the issue is, you know, going to be
19 whether or not there's some form of appropriate release. But
20 we don't need to worry about that. But so, yes, I think they
21 do need an affirmative opt-in ballot.

22 MR. FORNARI: Thank you, Your Honor.

23 MR. FREEDMAN: Your Honor, to be clear, there are
24 really two issues that the United States Trustee is raising.
25 One has to do with whether or not an affirmative vote is

1 required.

2 THE CLERK: Stand near a mike.

3 MR. FREEDMAN: One has to do whether or not an
4 affirmative vote is required, which is what the provision would
5 require. The second has to do with whether on top of that
6 affirmative vote the claimant is somehow required under
7 applicable Third Circuit law to be asked to opt in to the
8 release. We do not believe that Third Circuit law requires
9 that. We don't think that there is authority in the Third
10 Circuit, contrary to what the United States Trustee is arguing,
11 that says that on top of the affirmative vote there is a
12 requirement for an affirmative opt in, and we would --

13 THE COURT: Oh, I see. I think, Mr. Freedman, the
14 issue actually in the Third Circuit is not so much an opt in.
15 It's really a disclosure issue. And the issue, as I have seen
16 most of the cases come down, is you don't necessarily have to
17 have a box on the ballot that says I opt in, but you do need in
18 very highlighted, bold, separately segregated language
19 somewhere a provision that indicates what the release is in no
20 uncertain terms, or else essentially those ballots won't be
21 counted. So if you don't put a separate checkoff box that says
22 I opt in, then you better make sure that the disclosure is very
23 prominently displayed, and then the ballot may be able to be
24 counted. The safer practice is simply to have a separate opt
25 in ballot, because in almost every instance people check it

1 anyway. So --

2 MR. FREEDMAN: Your Honor, we believe that under the
3 circumstances of this plan to have a separate opt in ballot,
4 particularly in the context of a plan that contemplates a
5 524(g) injunction, you would create confusion as to that and --

6 THE COURT: But you don't need it for the 524(g)
7 folks.

8 MR. FREEDMAN: You don't need it, but a creditor that
9 is voting may not fully understand the implications of that. We
10 believe that --

11 THE COURT: Why? It'll only be your Class 9 people
12 for the most part. Everybody else is going to be under the
13 524(g). Aren't they?

14 MR. FREEDMAN: That may be the case, Your Honor,
15 but --

16 THE COURT: So those folks ought to understand. The
17 trade creditors vote all the time, and your bank lenders will
18 certainly understand.

19 MR. FREEDMAN: We believe that it would impose a
20 burden --

21 THE COURT: I don't. I don't think it will impose
22 any burden.

23 MR. FREEDMAN: Is the Court now instructing us that
24 we need to put the affirmative opt in box or just the
25 affirmative vote on the ballot for the general unsecured

1 creditors in Class 9 --

2 THE COURT: Well --

3 MR. FREEDMAN: -- that are being asked to
4 provisionally vote for the plan?

5 THE COURT: I'm asking what ballots it has to go on.
6 I'm not even sure under the voting structure of this plan who
7 all is covered by that language, because I -- I'm not sure I
8 know the class structure well enough to know who all --

9 MR. FREEDMAN: The current impaired classes are Class
10 6, the Canadian ZAI class, and the Equity Class. And as to
11 those classes, we think that the plan should not provide for an
12 affirmative opt in but simply provide in very clear language
13 that the effect of a vote for the plan is to grant that
14 release, and we will so make clear in the solicitation
15 materials.

16 We are also soliciting Class 9 provisionally, so we
17 have to address the issue for that purpose. That class is
18 getting paid 100 cents dollars on their allowed claim, and we
19 again believe that under those circumstances we don't need to
20 provide an affirmative opt in but simply have a structure that
21 says that if you vote for the plan, with very clear disclosure
22 about the impact of that vote, that that's adequate to satisfy
23 the standards.

24 THE COURT: Well, let's see. So, actually, the
25 524(g) ballot -- you're actually asking not -- the people in

1 Class 6 to provide a release not just to get the injunction, so
2 they would need to affirmatively vote, because you're asking
3 them to release the asbestos-protected parties not just to get
4 an injunction in favor of them. Why?

5 MR. FREEDMAN: But they have to vote -- they have to
6 vote anyway for a 75 percent vote.

7 THE COURT: But why are they providing a release in
8 addition to getting an injunction?

9 MR. FREEDMAN: There are --

10 THE COURT: You need to use a --

11 MR. FREEDMAN: In a complicated case like this, which
12 has gone on for as long as this case has gone on, it is
13 appropriate to provide that there be a release for the various
14 parties that are identified in the plan in addition to the
15 protection of the injunction.

16 THE COURT: Why? Why do the asbestos-protected
17 parties need a release? The automatic stay has prevented them
18 from doing anything for the past six years, so why do they need
19 a release? If you want to break out the professionals and so
20 forth in the case, then the exculpation provisions, as I've
21 articulated earlier, I think eliminate the whole need for this
22 voting issue in the first place. As to the asbestos-protected
23 parties, what are they contributing in addition to the
24 contributions that would get them a 524(g)injunction that
25 require a release?

1 MR. BERNICK: Your Honor, we're getting close to the
2 lunch hour anyhow, and I'm not suggesting we take a break, but
3 rather than -- I think the U.S. Trustee was asking for Your
4 Honor to state at this point the objection is sustained X, Y,
5 Z. I think that in light of all the discussion that we have
6 had, maybe we ought to caucus a little bit and report back to
7 the Court after lunch what it is that we are -- where we're at
8 on this. I suspect that Your Honor has talked about the
9 exculpation clause, and it may be that that is a way of
10 eliminating the whole issue. I don't -- I think what we're
11 really -- what we --

12 THE COURT: Well, it is for the professionals.
13 Excuse me.

14 MR. BERNICK: Right.

15 THE COURT: Yes --

16 MR. BERNICK: What we don't want to get into --

17 THE COURT: -- and the committees.

18 MR. BERNICK: -- though is soliciting, and the
19 solicitation with respect to the other impaired classes, and
20 I'm setting aside Class 9, is whether it's impaired or not is
21 an issue.

22 THE COURT: Yes.

23 MR. BERNICK: But with respect to the other classes
24 that are impaired classes, what we want to avoid is having to
25 send out a ballot that is unnecessarily confusing. Your Honor

1 then raises the question, well, why do you need the release at
2 all, and that's something that I want to make sure that before
3 we articulate it to the Court that we thought through pretty
4 carefully exactly what our articulation is. As I take it, the
5 force of Your Honor's query is that if they are already covered
6 by 524(g), you don't need the release, and, therefore, we don't
7 have to go down this road at all. And that's something that I
8 think we have to think about before we address further with the
9 Court.

10 THE COURT: All right.

11 MR. CHEHI: And if I may, Your Honor -- Mark Chehi
12 for Sealed Air -- just point out for the Court's information
13 and the parties here that the Sealed Air settlement agreement
14 contains many important terms that relate to releases that have
15 to be incorporated in the plan for the benefit of Sealed Air.
16 Indemnities and the like are implicated. And that this issue
17 of the terms of releases and injunctions in the plan under
18 524(g) and otherwise bear heavily upon whether or not the plan
19 will indeed be able to vindicate the Sealed Air settlement, so
20 that Sealed Air can support it. And we just want to make sure
21 that the parties understand that.

22 THE COURT: Well, that may be the case, too, but I'm
23 not sure it has to be in that specific provision encompassed
24 the way it is, but okay. Mr. Fornari, I guess until after
25 lunch I won't give you a ruling. After lunch, when I hear the

1 need for the releases and whether or not this provision's going
2 to be modified, then I guess I'll give you a ruling.

3 MR. FORNARI: Thank you, Your Honor.

4 THE COURT: All right.

5 MR. BERNICK: If we can continue to move -- oh, I'm
6 sorry. There's somebody else who wanted to speak.

7 MR. DEMMY: Your Honor, John Demmy on behalf of
8 Fireman's Fund Insurance Company. And Mr. Bernick's question
9 mark on the chart here on this item prompts me to rise to say
10 just a couple of words, because I don't think we really made an
11 objection on the third party releases in the exculpation per
12 se. What we did in our objection was reference a couple of
13 provisions that relate to insurers, one being what we assume to
14 be the discharge provisions of the plan that would affect the
15 debtors' continuing obligations under insurance contracts, and
16 also the injunction with respect to contribution claims, that
17 being the ability of a non-settling insurer to assert a
18 contribution claim against a settling insurer.

19 And we raise both of those points in the context of
20 the debtors' plan provisions regarding insurance neutrality,
21 Your Honor. And I think these comments will probably be
22 applicable to the other Fireman's Fund items that are on the
23 chart, but I'm not getting to those. I just note that as my
24 perception.

25 Your Honor, it -- the insurers I think, speaking for

1 Fireman's Fund and perhaps for some others, are interested in
2 having discussion with the plan proponents about neutrality.
3 It's been something that we really haven't been able to do,
4 because some of the key documents have not been filed or only
5 recently filed, including the Exhibit 5 that we've heard about,
6 Exhibit 6, the transfer agreement, which was only filed over
7 the weekend, and also Fireman's Fund raised the missing
8 cooperation agreement, which I believe is Exhibit 10 in the
9 book, which I don't believe has yet been filed, but the debtors
10 have indicated that it would be at some point I think prior to
11 the close of the disclosure statement hearing.

12 But, Your Honor, with those agreements and noting
13 that we haven't really even had a chance to review them with
14 our clients yet, but we intend to do so and proceed forward, we
15 think it would be appropriate for there to be some discussion
16 on neutrality and other provisions that relate to insurers. I
17 don't want to suggest that I'm going to be arguing confirmation
18 issues. What I'm suggesting is I think we could work through a
19 lot of these issues, so that we perhaps don't have to fight
20 about some of the confirmation issues that are noted on the
21 chart here.

22 THE COURT: All right.

23 MR. BERNICK: Your Honor, our anticipation was to
24 deal with the -- and I appreciate counsel's rising because of
25 Fireman's Fund and the question mark reference that's made in

1 Category 3, but we did intend to raise the insurance issues as
2 a group in connection with Category 7, and, fundamentally, they
3 do go to the question of neutrality and the neutrality
4 language. And, again, it is our view, and it's quite simple,
5 that those are confirmation issues that do not have to hang up
6 the sending of this document out for a vote, but we'll be happy
7 to address that in connection with Category 7.

8 On Category 4, which are the classification issues,
9 essentially, classification is raised by two parties -- two
10 objectors. One are the Libby folks, and two are the people who
11 hold indirect claims. And I think that, you know, the
12 threshold issue again is whether this is something that has to
13 be dealt with now. Clearly, the Court does have the discretion
14 to take up classification issues at the disclosure statement
15 stage, but in this instance none of these classification issues
16 actually threaten to affect what I'll call swing votes and key
17 classes. That is to say the Libby folks want a separate class,
18 but the inclusion of them in the Class 6 is not going to affect
19 the Class 6 vote in all likelihood.

20 Likewise, with respect to the indirect personal
21 injury claimants, which we would construe to affect, does, in
22 fact, include both Bank of America that has objected as well as
23 CNA, which is one of the insurers of the State of Montana.
24 They would seek to be in Class 9. Class 9 is likely to be a
25 vote no class anyhow.

1 So but what we would say with respect to
2 classification is that these matters not only be taken up in
3 connection with confirmation, but they're really not going to
4 present much of an issue. In at least all my experience in
5 connection with these asbestos cases is that they do not, and
6 in the particular -- it's particularly true here. Libby -- the
7 Libby claimants -- and I know that Mr. Lockwood may have
8 additional observations on this, but the Libby claimants are
9 basically saying that we've already -- we've basically taken a
10 classification scheme that is very middle of the road. It's
11 the same kind of classification scheme that was used in
12 Armstrong and USG. It's a classification scheme that neither
13 is too general in the sense of lumping everybody together, nor
14 does it take the risk of there being a gerrymander issue by
15 being too specialized. So we have not simply grouped everybody
16 as an unsecured claimant, which technically would include PD,
17 PI, as well as the commercial creditors, nor have we gone
18 within the different subgroups and divided them further. So
19 it's really pretty much right down the middle.

20 So the Libby people say, well, gee, it's not really
21 good enough that you've got personal injury asbestos. You
22 should have personal injury asbestos that is specific to a
23 particular location. They can't say that the asbestos as a
24 material is somehow different at Libby, because that same
25 asbestos, to the extent that it was a natural contaminant at

1 Libby, also is present, although we believe in extremely small
2 amounts, in a variety of other Grace products that were sent
3 out.

4 So the Libby people basically say they ought to have
5 their own individual specific class, and that it has
6 classically a situation which runs afoul of what is essentially
7 the latitude that's afforded to plan proponents to have more
8 general groupings. Indeed there's kind of a presumption in
9 favor of more general groupings. This is the same general
10 grouping, i.e., the personal injury claimants that was again
11 used in Armstrong and also was used in USG and probably a
12 variety of others as well.

13 So the objection the Libby people really have is to
14 the TDP that they have in the -- with respect to the personal
15 injury trust, and that is a different matter. It's not really
16 a classification matter at all. And given the standards of the
17 platy classification, we don't believe that their claim is
18 going -- of discrimination, or improper classification, I
19 should say -- that their claim of improper classification is
20 going to hold the cart up too much at confirmation, but it is a
21 confirmation issue.

22 With respect to the indirect personal injury
23 claimants which include both insurers to a certain extent but
24 also Bank of America, the answer is relatively simple, which is
25 that 524(g) specifically contemplates that all claims arising

1 from a personal injury liability basically get channeled to and
2 handled by a 524(g) trust. And so again for that basic reason
3 it makes sense to classify that as being one class that is
4 commensurate with the trust, and the idea of putting not only
5 direct personal injury claims but indirect personal injury
6 claims in the same class for precisely that reason is not
7 novel. It was done in Armstrong. It was done in USG. It's
8 probably been done in others that I'm less familiar with. It
9 was specifically upheld by Judge Robreno in connection with the
10 Armstrong case.

11 So again the classification issue is really not a
12 difficult issue. We think it could be taken up in connection
13 with the confirmation. But even were it to be taken up now,
14 we've not done anything that's novel in this plan at all. It
15 follows the mainstream of classification, and under the rules
16 that apply to that we believe it's totally appropriate.

17 THE COURT: Mr. Cohn.

18 MR. COHN: Yes, Your Honor. As we stated in our
19 papers, Libby asbestos is different. It is amphibole asbestos,
20 whereas, the asbestos that Grace used everywhere else in its
21 products was a serpentine asbestos, or we call it chrysotile.
22 So it is a different asbestos. It is -- it has -- it results
23 in a different disease. Mr. Bernick said, well, but it's not
24 just in Libby. It would be in trace amounts in others of
25 Grace's products, but we know of no claims that are based on

1 Libby asbestos disease outside of Libby.

2 So you do have a type of asbestos which is unique,
3 and you have a set of claimants who claim disease under that
4 form of asbestos not from Grace's products and not the
5 chrysotile asbestos that was used that generates really all the
6 rest of the claims against Grace.

7 The second distinction between Libby claimants and
8 the rest of the asbestos PI claimants has to do with insurance
9 rights. Because the Libby claims arose out of Grace's
10 operations basically blanketing this small town in Montana with
11 toxic asbestos dust. The way that those claims are insured
12 under insurance policies is through what's called premises or
13 operations coverage as opposed to products or completed
14 operations coverage. And what's important about that
15 distinction, Your Honor, is that products coverage is subject
16 to aggregate caps. That's the way that -- that's the way that
17 it was done in the comprehensive general liability policy
18 industry and the way that Grace's policies work, too.

19 So there are aggregate limits on products coverage,
20 which necessitate having the coverage administered by a PI
21 trust. It's the only fair way to do it when you -- to provide
22 everybody a ratable share of what insurance coverage there is.
23 But when you have coverage that's not subject to an aggregate
24 cap, there's no particular reason why it needs to be
25 centralized, why the administration of it needs to be

1 centralized, or why you can't just let the claimants go and
2 pursue the insurance coverage for their particular claim. It
3 doesn't take anything away from any other claimant.

4 Now, that's a different legal right. Remember
5 classification has to do with what are your legal rights. The
6 first one was when you talk about the type of asbestos, you're
7 talking about a legal right as against the debtor. When you
8 talk about insurance coverage, of course, you're talking about
9 a legal right against a third party, but it's the third party
10 who's going to be the subject of an injunction under the plan,
11 at least as it's now written. And so it's the exact same
12 thing. You have to measure the legal rights that are being
13 taken away under the plan. And for purposes of the legal
14 rights that are being taken away under the plan, the Libby
15 claimants' rights are very different from everybody else's
16 rights, and for that reason they are entitled to a separate
17 class, because those claims are not substantially similar to
18 the other asbestos PI claims.

19 Now, this is not just an abstract principle, Your
20 Honor. You've seen the way that it's played through in this
21 particular plan, which is that the asbestos PI claimants as a
22 group have written a TDP that serves their purposes but does
23 not treat fairly the Libby claimants, and now they're trying to
24 disenfranchise the Libby claimants by throwing us into the same
25 class as everybody else and having our votes be swamped by the

1 votes of the vast majority of asbestos PI claimants. These
2 claims arise from exposure to Grace's products, or I should say
3 alleged exposure to Grace's products, because as Grace has
4 pointed out on numerous occasions, there are all sorts of
5 questions about the validity of any of those claims. But we're
6 going to get swamped by those hundreds of thousands of votes,
7 and these are votes of people who have very different legal
8 rights than the Libby claimants do, which presumably is why
9 they are willing apparently to vote in favor of the plan as now
10 constituted by the Libby claimants or not.

11 So in order to enfranchise the Libby claimants as the
12 classification scheme of the Bankruptcy Code clearly envisions
13 because of our separate legal rights, separation classification
14 is required. And, you know, why -- and, of course, as to
15 whether this is a fundamental issue, it obviously -- it goes to
16 the very heart of whether this plan is a confirmable plan,
17 because if that classification is wrong, then this plan is
18 clearly unconfirmable, and we would really just be wasting our
19 time to send it out to a vote. Thank you.

20 MR. LOCKWOOD: This is not an evidentiary hearing,
21 and Mr. Cohn is not an expert witness. Mr. Cohn has gotten up
22 here and asked this Court to determine today in connection with
23 the disclosure statement hearing, based on his assertions of
24 fact, that this plan is unconfirmable, because it improperly
25 classifies Libby claimants with everybody else.

1 Your Honor, I'm not going to explain the manifold
2 different ways in which Mr. Cohn is mistaken in the assertions
3 that he's made to you. All I will say -- well, I will say two
4 things. The first and most important is this is the subject of
5 an evidentiary hearing is required to determine whether what he
6 says has any basis in fact, and the appropriate evidentiary
7 hearing for that is a confirmation hearing. There is no
8 evidentiary hearing proposed for a disclosure statement
9 hearing, and one would not be appropriate if it were being
10 proposed. These are very complicated matters and his
11 assertions about them are not -- I mean there are enough
12 aspects of what he says that are correct that in order to
13 explain why his ultimate conclusions about where he's going are
14 incorrect is not simple.

15 To just touch briefly on what the types of factual
16 issues that are presented by his assertions, he's essentially
17 given you three different grounds on which there should be no
18 classification of the Libby claimants with everybody else. I
19 would note, however, to start with that there has never been an
20 asbestos plan confirmed that I am aware of, and certainly none
21 that Your Honor has confirmed, where we have had multiple
22 classes of asbestos personal injury claimants, because one
23 class -- one subgroup felt that it wanted better treatment.
24 And indeed Your Honor has rejected in a couple of cases efforts
25 by the holders who have settled claims to be separately

1 classified by asserting that they have contract claims rather
2 than tort claims. Here the Libby claimants could have tort
3 claims, and they're unliquidated tort claims, so you don't even
4 have that type of a we're different argument.

5 Now, what are his three points? He says, well, Libby
6 asbestos is a different kind of asbestos. It's an amphibole.
7 It's not chrysotile. There's lots of different kinds of
8 amphibole asbestos, Your Honor. The so-called what used to be
9 referred to by the Libby claimants as Tremolite, which is now
10 being referred to as Winterite, and God knows what it's going
11 to morph into the next time we get further refinements on it,
12 is simply one kind of amphibole asbestos, and there are many
13 other kinds and many companies that had asbestos-containing
14 products, had some with chrysotile in them and some with other
15 kinds of amphiboles in them. And while it is generally
16 accepted that the amphiboles are more dangerous than
17 chrysotile, at the end of the day nobody has ever made a
18 distinction between -- on that basis.

19 Secondly, Monokote, Grace's spray-on product,
20 contained vermiculite, so the notion that somehow or another
21 the only form of amphibole asbestos that any Grace claimant
22 ever got exposed to was in Libby, this is factually incorrect.
23 I mean you can make arguments about the differing natures of
24 their exposure and it's non-occupational, and it's, you know, I
25 mean -- but that gets you into what the Supreme Court decided

1 outside of bankruptcy in the Ortiz and AmChem cases which says
2 everybody has got a unique kind of claim. In some sense
3 they've got different exposure. They've got different disease.
4 They've got different earnings capacity. They've got different
5 numbers of dependents. I mean there's -- every claim is
6 different, and indeed 524(g) says that in effect you can't
7 identify all of the claims and everything. That sort of --
8 it's sort of a given. So that simply isn't going to work at
9 the confirmation hearing, but it certainly can't work at a
10 situation what we're having is Mr. Cohn's assertions presented
11 as fact.

12 The second one has to do with insurance rights.
13 Again, while there is -- Mr. Cohn is correct that there are
14 different types of insurance coverage and CGL policies,
15 sometimes called products versus non-products, sometimes called
16 products and completed operations versus premises and
17 operations, and generally speaking, products has aggregate
18 limits, and frequently non-products does not have aggregate
19 limits, it does not flow from that that the Libby claimants
20 once again are uniquely situated in that regard, or that
21 individual claimants have direct rights against individual
22 insurance, which in some way or another are being, quote, taken
23 away from them in a situation where insurance proceeds are
24 being transferred to a trust.

25 The whole issue of insurance is complex. This

1 insurance is being assigned to a trust to the extent that it's
2 unsettled, which is most of what he's talking about. The
3 trust, if it is ever going to be settled, it will not be
4 settled by having individual Libby claimants and the individual
5 other kind of claimants pursuing the insurers as a matter of
6 state coverage law. If you're -- if the idea is, as I think is
7 implicit in Mr. Cohn's suggestion that you're going to pass
8 these insurance rights through the trust into the hands of the
9 individual claimants, you can't even sue an insurer under most
10 state law until you've got a judgment or consented to
11 settlement with the insured, which in this case is either going
12 to be Grace pre-petition or the trust.

13 And so the idea that we'll just sort of, oh, well, I
14 have a different right, you're taking away my right to get this
15 insurance, and I need to be separately classified in order to
16 protect that is a gross oversimplification and will require, if
17 we go to confirmation on this, expert testimony from insurance
18 lawyers about how this is actually (a) works under the
19 insurance law, (b) works in a bankruptcy case, and © how a
20 trust could ever deal with this in a post-consummation
21 environment if you had the sort of pass through that Mr. Cohn
22 sort of cavalierly discusses here.

23 Finally, asbestos claimants are being disenfranchised
24 by being swamped by other claims. Well, I mean again, any
25 minority that wants separate treatment and better treatment --

1 and let there be no doubt about what we're talking about here.
2 The Libby claimants want better treatment. If you read their
3 brief, all 97 pages of it, the vast bulk of it consists of
4 saying we want more money, and the reason they're being
5 disenfranchised, and they claim having their -- the Committee's
6 fiduciary obligations to them violated, is that because
7 although the Committee, as we will explain in confirmation, has
8 put in a number of special Libby provisions that are -- never
9 been in any other TDP that Your Honor has seen before. We
10 haven't put enough of them in. The values aren't high enough.
11 The special treatment isn't good enough. And if the notion is
12 that in order to get a separate class, you come in and say,
13 well, I don't like the way I think the plan as a whole works
14 for my class, and the other people in my class are going to out
15 vote me, and that means I get disenfranchised, where's the end
16 of it. I mean you have -- I mean anybody who doesn't like the
17 deal for the class as a whole could come in and make the exact
18 same argument. It's sort of a reductio ad absurdum by its own
19 terms.

20 So, I repeat, this is a confirmation issue. We will,
21 at an appropriate time, counter whatever evidence the Libby
22 claimants propose to put on about how they're unfairly being
23 treated, which I might add, by the way, there's another
24 entertaining argument, which we'll get to maybe later on when
25 they attack the TDP. On the one hand, they want to get

1 separately classified. On the other hand, in the argument that
2 there's unequal treatment under 1123(a)(4) their argument
3 basically is they're being unequally treated, because they're
4 being equally treated, and I mean this is simply not something
5 that is appropriate or even feasible to deal with in a
6 disclosure statement context, Your Honor. Thank you.

7 MR. BERNICK: Your Honor, I just want to add a couple
8 things, because Mr. Lockwood is -- the ACC and the FCR have
9 been overwhelmingly responsible for dealing with Libby-related
10 issues as is appropriate. Obviously, the debtor is cognizant
11 of them and is on board with them, but there have been -- Mr.
12 Lockwood perhaps in a show of professional modesty here really
13 has probably under -- or has not presented fully to the Court
14 how extensive the dialogue has been with the Libby claimants to
15 bring them on board. Not only counsel for the ACC and the FCR
16 but actually, you know, individuals who are on the Committee
17 have been very active in seeking out and trying to bring on
18 board the Libby claimants in particular. The result of that
19 being, as Mr. Lockwood indicates, many provisions that were
20 really, you know, as part of the TDP hand tailored to meet what
21 were set to be the special needs of the Libby claimants.

22 I rise only to point out a couple -- one additional
23 -- two additional facts and then to make an observation about
24 the issue that we really face here. The two additional facts
25 add to what were -- what was Mr. Lockwood's theme, which is the

1 inability to kind of draw a bright line with respect to the
2 position that the Libby folks attempt to take here. They are
3 not the only ones who have made claims for exposure to
4 vermiculite that contains asbestos. Vermiculite that contains
5 some element of asbestos contamination was sold to expanding
6 plants or to other customers who operated expanding plants. It
7 is in different kinds of products, and, in fact, I'm told that
8 there are many claimants, indeed in the thousands of claimants,
9 who have filed personal injury proofs of claim timely under the
10 bar date that do not claim exposure to other products that
11 contain the chrysotile. So when Mr. Cohn rises to say that
12 they had exposure to an entirely different kind of asbestos,
13 that is not unique to the Libby claimants, and, therefore, the
14 category that he would seek to explain is not a neatly defined
15 category, and it's not specific to the Libby people.

16 When he says that there's a different disease, not
17 only is Mr. Lockwood correct that there are evidentiary issues
18 about whether that really is, in fact, so, it certainly is the
19 case that for voting purposes it would be very difficult to
20 begin to draw that line. They claim pleural disease. There
21 are all kinds of people who claim pleural disease. They say
22 it's a different pleural disease. How easy is it to really
23 draw that line?

24 And that really brings me to my central point, which
25 I think is almost a legal point here, which is that what we're

1 talking about is the vote. We're not talking about equal
2 treatment under 524(g). That is a separate issue that I know
3 that Mr. Lockwood is going to be addressing. We're talking
4 about whether they should be classified differently for voting
5 purposes, and these kinds of differentiations that the Libby
6 people attempt to draw we believe incorrect -- with an
7 incorrectly or misleading aspiration to precision really would
8 be impossible to execute in the context of a vote. What do you
9 do, have a doctor's diagnosis that -- that has to be determined
10 to be unique before your vote is counted in one category or
11 another? That's not the nature of classification for voting
12 purposes.

13 It also even more fundamentally not only presents a
14 feasibility issue, it presents a real threat to 524(g). The
15 whole idea of 524(g) is that the 75 percent vote is designed to
16 be able to structure a trust that has certain properties. If
17 we require gerrymandering, which is exactly the opposite of
18 what's supposed to be done for classification -- voting for
19 classification purposes, effectively we create smaller and
20 smaller groups of people, every one of which will then say
21 that, well, gee, it's got to be 75 percent of my group, in
22 which case effectively the 75 percent voting requirement of
23 524(g) for purposes of setting up a trust then becomes
24 fractionated, which defeats the whole purpose of 524(g), which
25 is to enable very special treatment for a certain kind of

1 claimant, i.e., a personal injury asbestos claimant, which is
2 what we have here.

3 So I think that Mr. Lockwood's points are not only
4 accurate, but they really go to the whole question of what
5 classification we're talking about. It's a classification for
6 voting purposes that has a particularly important dimension in
7 the context of 524(g). Whether or not the Libby asbestos
8 claimants are being adequately treated under the TDP is a
9 separate issue. I suspect Mr. Lockwood will say again as a
10 matter -- where evidence is going to be required, but none of
11 this really goes to the question of what the appropriate
12 classification is, and we have followed again the absolute
13 mainstream of the cases in saying that the classification
14 should be the personal injury asbestos claimants.

15 MR. RAMOS: Good afternoon, Your Honor. Marcos
16 Ramos, Richards, Layton, and Finger on behalf of Bank of
17 America. Your Honor, we appreciate counsel's comments that
18 some of the issues -- these issues that Bank of America raised
19 in its opposition are more appropriate for the confirmation
20 hearing. Obviously, we don't disagree with that. They will be
21 confirmation issues. For the reasons that we set forth in our
22 opposition, we think that they're also appropriate for the
23 Court to consider at this stage. You know, let me give you
24 just two seconds of background in terms of the Bank of America
25 circumstances.

1 We're parties to a letter of credit, and these were
2 pre-petition letters of credit. There were three of them. And
3 during the course of this bankruptcy proceeding they were drawn
4 upon. During this bankruptcy proceeding the debtors entered
5 into a settlement agreement with Bank of America regarding its
6 claims related to those letters of credit. There was a
7 settlement -- a 9019 motion presented to the Court. The Court
8 entered an order. The settlement stipulation was approved.
9 Bank of America has an allowed claim in these cases based on
10 the draws under the letter of credit, and to my understanding
11 standing here today, the amount of that claim is approximately
12 -- the allowed claim is approximately 16.5 million or so.

13 And I was struck during the discussion by prior -- by
14 immediately proceeding counsel with regards to the Class 6
15 where we believe that Bank of America has been improperly
16 placed. They were speaking regarding the products that give
17 rise to various sorts of liabilities, and there's a lot of
18 discussion of the details. We're not that type of claimant.
19 Our claim is based on a financial transaction. It's a
20 transaction with the debtor. It was in favor of not asbestos
21 claimants but companies, insurance companies, and various of
22 them. We had letters of credit that did not provide use
23 restrictions in terms of the use of the funds under the letter
24 of credit. We gave money out, and that money went wherever it
25 went, but it wasn't something that we had a role in in terms of

1 the disposition of those funds.

2 And the classification, as described by counsel,
3 presumes some relationship -- it's stated to have some
4 relationship to this underlying asbestos liability, but there's
5 no explanation in the disclosure statement other than that bare
6 assertion as to why -- that our relationship -- the specifics
7 of our relationship give rise to that sort of classification.
8 That's it. It's one statement in the disclosure statement.
9 There's nothing more beyond it that explains the position as to
10 why our letter of credit didn't involve payment to these
11 claimants and involve these -- a regular pre-petition financing
12 transaction is being put into a Class 6.

13 And it's not only the lack of discretion, Your Honor.
14 The fact of the matter is, as I mentioned, we had an agreement
15 with the debtors during the course of the bankruptcy
16 proceeding, which was approved by the Court by separate order.
17 We are very surprised to be put into this classification. To
18 our eye, we were -- we have an allowed claim. That's what the
19 stipulation says. It's an unsecured -- excuse me, Your Honor
20 -- unsecured claim. And we feel strongly that, based on the
21 mere fact of our circumstance, that clearly we've been put into
22 the wrong classification.

23 Even if you look at the procedures that are set out
24 in terms of how the trust is going to proceed, there are a lot
25 of procedures in terms of the TDP. Specifically under the plan

1 it states that claims subject to the TDP are neither allowed or
2 disallowed, but we have an order of the Court allowing our
3 claim. There are procedures under the TDP in terms of
4 applicable percentage and payment percentage and maximum
5 percentage, and I understand that counsel's going to get back
6 to us by the end of this week with maybe the percentage -- the
7 payment percentage under the plan -- the TDP, and then we can
8 get some better understanding of how those mechanics work in
9 our discussions with them.

10 But we're -- we have an allowed claim already, not
11 subject to further determination by the Trustee under the TDP.
12 We're just not in that circumstance. We've got an allowed
13 claim, and we're -- it's based on a financial instrument which
14 is unrelated to asbestos liability. It's a letter of credit.
15 It's a contract. So, Your Honor, we think that's appropriate
16 for Your Honor to consider today, because of the reasons that
17 we set forth in our opposition, and I don't want to belabor it.
18 We think we've set those out pretty strongly in the opposition
19 and for the reasons that I've discussed today.

20 Obviously, if we have to take it up just at the
21 confirmation hearing, we'll do so, prepare for such, and try to
22 figure out why other sort of financial transactions are in
23 Class 9, and we're in Class 6. But we do think it's -- it
24 actually is appropriate for today, because clearly on the
25 facts, which are as a matter of public record, because we have

1 a settlement stipulation approved by order of the Court, it's
2 known and accepted by both parties as to what our claim
3 actually is.

4 THE COURT: Okay, so the letters of credit were not
5 designated in any way to pay for anything specific. They were
6 just posted by the debtor for no purpose?

7 MR. RAMOS: Well, Your Honor, I've taken a look at
8 the letters of credit. They identify certain companies that
9 can make draw under them. I'm not aware of any provision in
10 the letter of credit that says the purpose for which the draw
11 will be made. There are various companies across three letters
12 of credit, and -- but is there a use restriction? I didn't see
13 in my review of the letter of credit, Your Honor, a presentment
14 in terms of the notice requirement.

15 Obviously, we think that based on the information in
16 the record that the majority of the funds under the three
17 letters of credit, one -- excuse me, Your Honor. Under two of
18 the letters of credit have been fully drawn by National Union
19 pursuant to separate agreements with the debtor. And but in
20 terms of the letters of credit itself, we think we provided
21 money, a fungible good. The use was -- the agreement was
22 between the debtors. The beneficiaries were not the asbestos
23 claimants. We're just differently situated in terms of our
24 claim status which seems directly at odds with the way that the
25 debtor -- the plan proponents have described the claims subject

1 to the TDP.

2 There are a lot of mechanical issues that just don't
3 seem to work, and we'll get into those I guess in our
4 discussions more deeply with the plan proponents. But for
5 today's purposes we do feel that those facts, as approved by
6 the Court in its order, are sufficient to take us out of the
7 scope of what otherwise seems to be the Class 6 issues.

8 THE COURT: Okay.

9 MR. BERNICK: Your Honor, the issue again goes back
10 to the scope of 524(g) and what 524(g) is about. 524(g) by its
11 terms deals with liabilities that arise from asbestos exposure.
12 There are any number of different kinds of arrangements that
13 will result in a given company or a given party being liable
14 for that underlying liability. Bank of America has a letter of
15 credit. We can talk about that in a moment. But there's a
16 whole group called the indirect asbestos personal injury
17 claimants, every one of whom has got a different hook that
18 makes them responsible for an underlying asbestos liability.

19 But the underlying liability is what drives the
20 liability of these people. They are -- there could be
21 indemnifications. There could be contributions. In this case
22 there is a letter of credit. Because 524(g) is designed to
23 give complete closure, it specifically contemplates -- indeed
24 by its terms covers indirect personal injury claims, every one
25 of which is being -- implicates somebody who is not a

1 tortfeasor or many companies that are not tortfeasors. It
2 could also be tortfeasors, but many companies are not
3 tortfeasors, people with indemnity obligations, people who have
4 some other kind of obligation that gives rise to their
5 liability, but the underlying liability is tort. 524(g) by its
6 terms is designed to be precisely that broad, so you get
7 complete closure.

8 The only question, therefore, that arises in
9 connection with Bank of America is whether by virtue of what
10 counsel says, as counsel indicated, the assertion that in some
11 fashion the letter of credit had no relationship to the
12 underlying tort liability. If it was a totally standalone
13 liability, had nothing to do with any of that, that would be a
14 different point. At least my understanding is that of the \$16
15 million that's involved with that letter of credit, at least 10
16 million of that is specifically pegged to, was it National
17 Union? And National Union was the guarantor for --

18 UNIDENTIFIED ATTORNEY: The bonding company.

19 MR. BERNICK: I'm sorry, the bonding company for the
20 underlying liability, which was a liability for a case
21 involving Reaud, Morgan, and Quinn. So the underlying
22 liability with respect to at least that portion of the Bank of
23 America letter of credit is specifically geared to -- indeed
24 was specifically generated as a result of the underlying tort
25 liability.

1 At that point 524(g) does kick in. Now, counsel says
2 that in connection with this matter there was an agreement or a
3 stipulation to an allowed amount of the claim. The fact of
4 there being a stipulation to the allowed amount of the claim
5 says nothing about whether it's covered by 524(g) or by
6 something else. It simply says there's an agreement about the
7 allowed amount of the claim. It doesn't say in any way, shape,
8 or form, or imply in any way, shape, or form that somehow this
9 is outside the scope of 524(g) or outside the scope of a class
10 or outside the scope of the trust, and indeed it specifically
11 is not.

12 Now, it may be that in negotiating that stipulation
13 there was an absence of a negotiation about whether that
14 allowed amount would be paid 100-cent dollars, because it would
15 be treated under Class 9. Maybe there is. We know that in the
16 case of the property damage claimants they specifically
17 negotiated that they would be paid the allowed amount. That is
18 there was a negotiated resolution of their claims for an
19 allowed amount, and under the terms of those very settlements,
20 the property damage claims who have settled -- claimants who
21 have settled will get 100 cents of that allowed amount. It
22 appears that that discussion did not take place. That is there
23 was not a discussion leading to that stipulation that said not
24 only is this the allowed amount, but that is actually 100-cent
25 dollars what you are going to be paid.

1 But that is not a flaw of the classification system.
2 All that that says is that there was a limitation on the
3 undertaking that was made. The only undertaking that was made
4 was an undertaking that says the claim will be allowed at \$16.7
5 million. It didn't say it will actually get paid 100-cent
6 dollars, at which point whatever that stipulation is, that's
7 what it covered, and you go back to the nature of the claim.
8 The nature of the claim is defined under 524(g) about whether
9 it arises from an asbestos liability. This clearly does. So
10 we don't think there's properly a classification issue that's
11 being raised. It's a question about what the nature of the
12 stipulation was with Bank of America. In this case that
13 stipulation did not extend to the terms on which the letter of
14 credit would be paid in the context of the bankruptcy. Your
15 Honor is frowning a little bit like --

16 THE COURT: I thought that the bonding was used to
17 pay National Union 100 percent of what it in turn paid Reaud,
18 Morgan, and Quinn. So the letter of credit was drawn in full,
19 because it was the collateral that was used to pay the
20 insurance company 100 percent of what was used to pay the
21 settlement amount of the Reaud, Morgan, and Quinn amount. So
22 I'm confused as --

23 MR. BERNICK: It all -- no, that -- what's happened
24 here is that you have an underlying tort claim by Reaud,
25 Morgan, and Quinn. It is then the subject of the arrangement

1 with the insurance company, and you have the letter of credit
2 that is then used to pay off that arrangement. But whether --
3 but if you go back to National Union, National Union's ability
4 to take 100-cent dollars is limited by the terms of whatever
5 the -- whatever the -- you know, the plan calls for in the
6 classification scheme that it has. That is to say Reaud,
7 Morgan, and Quinn has got a claim for \$16 million, but that is
8 a tort claim. It gets paid no more than any other tort claim
9 would be paid under the terms of whatever plan calls for that
10 produces a vote under 524(g).

11 THE COURT: Wait. I think Reaud was already paid.
12 Wasn't it? That -- Reaud was paid by National Union --

13 MR. BERNICK: Reaud gets paid --

14 THE COURT: -- which was in turn paid by Bank of
15 America.

16 MR. BERNICK: That's correct, but the question is
17 whether --

18 THE COURT: That's how it works. So Bank of
19 America's left with the claim.

20 MR. BERNICK: The question is who takes the risk of
21 non-payment.

22 THE COURT: Right, and Bank of America did, because
23 it posted the letter.

24 MR. BERNICK: Right, as did National Union in the
25 first instance by being the bonding company.

1 THE COURT: Right.

2 MR. BERNICK: As did Reaud, Morgan, and Quinn, which
3 originally had the tort liability. All these people are taking
4 into a relationship that began with Reaud, Morgan, and Quinn.
5 Reaud --

6 THE COURT: Well, their clients.

7 MR. BERNICK: Well, it's their clients. So that is a
8 \$16 million -- it's a \$16 million claim. Reaud, Morgan, and
9 Quinn had no assurance, even if there were a settlement, that
10 it would get paid 100-cent dollars.

11 THE COURT: Well, it did, because it had a bonding
12 company --

13 MR. BERNICK: It had a bonding company, but the
14 bonding --

15 THE COURT: -- and backed up by a letter of credit.

16 MR. BERNICK: But the bonding company -- the bonding
17 company takes no more -- takes no greater rights than Reaud,
18 Morgan, and Quinn or their clients had in the first instance.
19 They took a risk when they did the bond that the underlying
20 liability might actually be less, and the same thing then
21 applies going up the chain. That is to say Reaud, Morgan, and
22 Quinn had a claim that was settled. Under the law that claim
23 as settled when it gets into bankruptcy may not get 100-cent
24 dollars. Maybe it only gets 50-cent dollars.

25 THE COURT: Well, okay, but we're past that, because

1 the reality is that for all the various reasons and all the
2 litigation that went on we're down to the fact that it got paid
3 the 16 and -- or got paid whatever the amounts were. I'm not
4 sure that it was 16 and a half.

5 MR. BERNICK: Sure. The question is now who takes
6 the risk of the difference. We didn't pay Reaud, Morgan, and
7 Quinn. Somebody else took on responsibility. The bonding
8 company took on responsibility for paying Reaud, Morgan, and
9 Quinn's client. At that point Reaud, Morgan, and Quinn may
10 have gotten off pretty well, gotten through pretty well,
11 because they got paid 100-cent dollars on their settled claim.
12 That doesn't make the debtor responsible for the fact that
13 Reaud, Morgan, and Quinn got paid that amount of money.

14 THE COURT: So basically what you're saying is that
15 the nature of the stipulation doesn't extend to the nature of
16 the claim. It simply --

17 MR. BERNICK: That's correct. I mean the stipulation
18 is what it is. It's the same kind of stipulation that we
19 entered into with property damage claimants. That we are going
20 to say they -- their claim will be allowed in a certain amount.
21 There's then this further step, well, does that claim get then
22 paid 100-cent dollars with respect to that allowed amount.
23 That second step of the negotiation took place in connection
24 with the property damage claimants as part of the settlement.
25 They said we want to get paid that under the plan. So, in

1 fact, that negotiation took place, and it had this result.

2 That hasn't taken place with respect to Bank of
3 America. All that happened with respect to Bank of America is
4 that there was an agreement that would be the allowed amount.
5 There was not the second stage of the discussion, which is how
6 much of that allowed amount actually gets paid. That hasn't
7 taken place. So I think that this again is a confirmation
8 issue. It's not a voting issue, and it's a little bit more
9 complex and perhaps somewhat factually oriented than we can
10 resolve here today. And I think that that's where the current
11 state of play is. Right now there's no record before the Court
12 even --

13 THE COURT: Yes, I think --

14 MR. BERNICK: -- about all the circumstances
15 surrounding that stipulation.

16 THE COURT: I think what's going to have to do with
17 -- be done with respect to these various voting issues is that
18 these ballots are simply going to have to be counted two ways.
19 That is the way that the debtor wants them counted and the way
20 that the objecting parties want them counted. And then we'll
21 see what happens, because at the moment I'm not sure I can
22 decide any of these legal issues that are encompassed within
23 this litigation issues, because it appears that there are some
24 potential legal issues. And I agree with you all, they are
25 really plan confirmation issues, and I can't, based on this

1 non-evidentiary record, decide the underlying legal issues. I
2 don't have the facts to be able to understand how the law
3 applies to them. I don't think the law is that complicated,
4 but the facts certainly are. So I think that's the issue.

5 From what I'm hearing from the debtors, to the extent
6 that the underlying liability on which the claim evolves is, in
7 fact, a tort liability, it's probability correctly classified,
8 but I don't have a clue as to what the original financial
9 transaction between the debtor and your client was and how that
10 plays out in a 524(g) context. It's going to take a brief.

11 MR. RAMOS: Your Honor, we'll be guided by those
12 statements. Obviously, I want to put on the record I disagree
13 with the description of counsel of the negotiations regarding
14 the settlement stipulation and what was not -- what was and
15 what was not done. I'm sure his statements will come as a
16 great surprise to my client. We'll reserve all of our other
17 rights, and we'll pursue discussions with the plan proponents
18 and get back to Your Honor with regards to the legal issues.

19 THE COURT: All right. I think that would be
20 helpful. So I think we'll just reserve this to a plan issue,
21 and what I'm going to order the debtor to do is simply as to
22 anybody who's objecting to classification reserve this to a
23 plan issue, simply put the votes -- and send the ballots out
24 the way the debtor plans to send them out, but then to have the
25 ballot agent count them two ways and have the debtor do the

1 solicitation -- I'm sorry -- the ballot summary two ways, the
2 way the debtor wants it done and then the way the objecting
3 party wants it done. We'll see whether -- it may not even make
4 a difference in the long run, so there's no sense worrying
5 about it. If it ends up not making a difference, then there's
6 no sense making a difference with respect to this Bank of
7 America issue.

8 With respect to the Zonolite issue, the Libby
9 claimants issue, that too I think is going to end up being a
10 legal issue that I agree, Mr. Lockwood, I don't have the
11 underlying facts at this point to know whether the form of
12 asbestos is or isn't different, whether the type of disease is
13 or isn't different. Those types of things, to know whether or
14 not they're a separate classification, even possible, I can't
15 make on the basis of this record.

16 What I can say on the basis of this record is that
17 the debtor has the absolute right for purposes of
18 classification to put similarly class -- similarly situated
19 claims into the same class, and if the debtor has chosen to do
20 that, that is an appropriate classification. From what I am
21 hearing, it sounds as though these are similarly situated
22 claims. Are they identical? Probably not. I don't know that
23 any two claims are ever identical, particularly when they're
24 personal injury claims.

25 I think the Supreme Court, as you pointed out

1 earlier, in the non-bankruptcy context went even so far as to
2 say that in class action litigation. That in which the --
3 probably the reason we have asbestos bankruptcies is, because
4 the Supreme Court said that in non-bankruptcy asbestos-related
5 class litigation. So I don't think that comes as any surprise
6 to anyone, but these do seem to be similarly situated, but I'm
7 not going to make findings about that. If it's a
8 classification issue for plan confirmation purposes, I'll deal
9 with it then. So I want the ballots counted both ways and a
10 ballot summary prepared both ways, and that will be true for
11 anybody who's raising classification issues, because it's just
12 not something I can deal with now. Mr. Monaco.

13 MR. MONACO: Thank you, Your Honor. Again for the
14 record, Frank Monaco for the State of Montana. I just want
15 more of a point of clarification from the debtor's counsel. I
16 thought Mr. Freedman said at the beginning of his presentation
17 and has indicated at Page 24 of their chart that's attached to
18 their reply to the disclosure statement objections that they
19 were going to work on language that would reflect Montana's
20 concerns with respect to classification. And if that's the
21 case, there's no sense having to say anything more. We can
22 discuss it, and if we can't resolve it, I guess we'll come back
23 on the 14th. And I just wanted to see if that is correct.

24 THE COURT: Mr. Freedman.

25 MR. FREEDMAN: Yes, Your Honor, we did indicate that

1 we will talk with the State of Montana about appropriate
2 disclosure on that issue.

3 MR. MONACO: Okay. That's all, because Mr. Bernick's
4 presentation seemed to indicate that we were going to argue
5 this, and if we're going to -- they're going to consider
6 language and be heard at the 14th, then we don't have to get
7 into it now.

8 THE COURT: Okay.

9 MR. MONACO: Your Honor, one other thing to sort of
10 move the --

11 MR. BERNICK: Just to be clear, that is true with
12 respect to the disclosure statement language. That's true with
13 respect to the disclosure statement language. We're not going
14 to be talking about on the 14th the classification for ultimate
15 plan purposes. That is, as Your Honor has indicated, to get
16 the vote, we'll just go get the vote, and then they'll be
17 counted two ways. I don't know what -- if you're speaking to
18 that issue, or if you're speaking, Mr. Monaco, to the question
19 of the disclosure statement.

20 THE COURT: No, I -- let me make -- in the event that
21 I confused the record, let me try to clarify it. Mr. Freedman
22 is going to talk to you, Mr. Monaco, about working out language
23 in the disclosure statement about the classification issue.
24 Correct, Mr. Freedman?

25 MR. FREEDMAN: Yes.

1 THE COURT: Okay. What I was attempting to do was
2 say that what I want for purposes of the ballots is to have the
3 votes counted the way the debtor is proposing to classify the
4 claims, however that works out in the ultimate disclosure
5 statement and ballots. And then I also want them, to the
6 extent there is still an objection, that on November 14th, to
7 the classification, I also want the ballot summaries recounted,
8 so it's done twice, for any objecting party, so I will have two
9 forms of ballot summaries, the debtors' way and the objecting
10 parties' way. That way I'll see whether it even makes a
11 difference. It may not make a difference.

12 MR. MONACO: That's fine. I just want the record to
13 be clear. We -- to the extent that we have suffered a loss in
14 our contribution indemnification claims prior to confirmation,
15 it's our position that it's a Class 9 general unsecured claim,
16 so we would expect to receive a ballot for a Class 9 claim.

17 MR. FREEDMAN: We have not in any way agreed to that.
18 We will submit them a ballot and count it two ways as the Court
19 has instructed, but we have not in any way agreed to anything
20 that suggests that they submitted a loss under the contribution
21 indemnification claim. It should be classified as anything
22 other than asbestos, period.

23 MR. MONACO: I'm not asking them to agree to that
24 today, Your Honor. I'm just saying we -- if -- it's understood
25 our rights are reserved on that point.

1 THE COURT: Everybody's rights are preserved, because
2 it's not something I think I can --

3 MR. MONACO: Right.

4 THE COURT: -- straighten out at the disclosure
5 statement hearing.

6 MR. MONACO: Okay. And, Your Honor, just --

7 THE COURT: But make sure you brief it, folks,
8 because --

9 MR. MONACO: We will, Your Honor.

10 THE COURT: Okay.

11 MR. BERNICK: For confirmation.

12 THE COURT: For confirmation, yes.

13 MR. MONACO: Yes, we intend to do so, Your Honor.

14 One thing just to move the process along. I note Mr. Bernick's
15 Category Number 5 on his chart.

16 THE COURT: Yes.

17 MR. MONACO: Well, the Crown's objection has been
18 moot, and Montana's not going to pursue the good faith issue,
19 so I think we could dispense with that and move on --

20 THE COURT: All right. Thank you.

21 MR. MONACO: -- to the next one.

22 THE COURT: Are we done with Number 4 before I mark
23 number 5, good faith, as moot? Okay. Number 4 we're done
24 with. Let me make a note, so I know what I've said about
25 Number 4, please.

1 (Pause)

2 THE COURT: I know we said we were going to break at
3 four. I'm not sure how close to the end you are. Do you want
4 to push through and not take a lunch, so you get done or --

5 MR. BERNICK: I think that -- I just, in fact -- I
6 had the same thought in mind.

7 THE COURT: But I am going to need a ruling on the
8 U.S. Trustee's issue, and I think you need to confer.

9 MR. BERNICK: Yes, I've got that marked for over --
10 maybe what we can do is just a very short lunch or just take a
11 break. Mr. Freedman tells me that he thinks that the last
12 category, which are actual disclosure statement issues that we
13 would like the Court to rule on, that is that we don't think
14 that they're appropriate, and the other side believes that they
15 are appropriate, will take about 40/45 minutes.

16 MR. FREEDMAN: I would think so, Your Honor, and then
17 there's also some issues related to the solicitation which we
18 could proceed forward on today.

19 THE COURT: All right.

20 MR. BERNICK: So what's the total time for all that?

21 MR. FREEDMAN: That should go very quickly.

22 MR. BERNICK: Okay.

23 MR. FREEDMAN: 20 minutes.

24 MR. BERNICK: 20 minutes. So that tells me probably
25 an hour and a half for the two of them, because nothing ever

1 goes as quickly as everybody would hope. Which then means
2 we've got mechanics of the TDP and insurance. On mechanics of
3 the TDP, Peter?

4 MR. LOCKWOOD: I would anticipate being fairly short.
5 I suspect Mr. Cohn -- I don't know what he's going to do. He's
6 got a lot of material in his brief.

7 MR. BERNICK: I'm assuming that we're not going to
8 deal with evidentiary matters today. My sense is that if we
9 took -- if it would be possible to take like, you know, maybe a
10 half hour break, that would put us at 1:20, even call it 1:30,
11 which would then give us a total of two and a half hours.
12 Maybe we've got a shot at getting it done.

13 THE COURT: All right. Let's be in recess until
14 1:20. By the time everybody gets back, it'll probably be 1:30,
15 so we'll say 1:20. All right. We're in recess.

16 (Recess)

17 THE COURT: Okay. We're ready to begin court again
18 now, so before I lose track of this, have you come to some
19 resolution of the issue that's left with respect to the U.S.
20 Trustee?

21 MR. BERNICK: Yes and no. It appears that we know
22 that exculpation is another question that Your Honor has raised
23 is whether and to what extent the need for the release, that is
24 the release to the extent it goes beyond the four corners of
25 524(g). And the answer to that is hard driven by what

1 knowledge is required in order to meet the terms of any
2 settlement agreement that we have with Sealed Air and
3 Fresenius. It's probably not something (indiscernible).

4 THE CLERK: (Indiscernible) on the bottom there.

5 MR. BERNICK: Does that help?

6 THE COURT: That's --

7 THE CLERK: Yes.

8 THE COURT: Yes, thank you.

9 MR. BERNICK: Okay. And I'm told by Sealed Air that
10 they'd have to check, but they're not sure that there is a
11 provision in their agreement. The agreement, again let me
12 stress, will control. They're not sure that there is a
13 provision in their agreement that would require this release.

14 THE COURT: All right.

15 MR. BERNICK: I am told by counsel for Fresenius that
16 there is a provision in their agreement that would require this
17 release.

18 THE COURT: All right.

19 MR. BERNICK: So I think that is still a live issue,
20 and so I think we're going to have to work on it. I think that
21 where it came down, Your Honor, though is that Your Honor was
22 -- the question is whether under the Zenith case there has to
23 be a consensual release. And I think that the issue then
24 becomes, in terms of the mechanics if we want to meet the
25 requirements of the Zenith case -- and, obviously, we have a --

1 we advanced a different view to the Court, which the Court has
2 indicated will be rejected. But if we want it to comply with
3 that principle that says that there must be a consensual
4 release, what constitutes the consent? And under the language
5 of the release as we've now drafted it, it would be either a
6 vote or the receipt of property.

7 Now, I would think that with respect to the vote that
8 really is more or less a question of the disclosure that's made
9 in connection with the vote. We would again say that having
10 them check off a box is more confusing than anything else,
11 because it basically requires that you interpret the failure to
12 check out the box, and whether it really means that they were
13 saying no, they don't want to agree to it or not.

14 So what I would propose is that we put a hyphen on
15 that issue and specifically reserve it until the 14th of
16 November notwithstanding my disinclination to reserve anymore
17 to the 14th of November. I think on this one, in light of the
18 language of the Fresenius agreement, we need to become very
19 much more focused on this, but for the Fresenius agreement I
20 don't think that we would still be here talking.

21 But with that, we're talking about value for the
22 estate and for all the different constituencies, so we had to
23 figure out a way to make Mr. Rosenblum agree that he's not
24 going to stand in the way of this enterprise. Being from
25 Chicago, he's back there smiling. I think that we might -- no,

1 in fairness to him, we have to figure out a way to address this
2 issue in light of the concerns that Your Honor's expressed and
3 see if we can't craft this in a way that meets Your Honor's
4 concerns.

5 THE COURT: Okay. I'm not overly concerned, provided
6 that the disclosure is very clear and very adequate whether or
7 not there is a check off the box on the front of the ballot
8 with respect to the release for Fresenius and Sealed Air if the
9 settlements provide for it, as long as the disclosure statement
10 picks up the fact that the settlements provided for it and
11 there is a disclosure somewhere that specifies it. There are
12 other asbestos-related parties though. I think it's not
13 necessarily clear what the extent of the release is and what
14 it's going to encompass. So my issue is I want something on
15 the front of the ballot itself that's going to tell the
16 impaired classes -- the voting classes what the effect of that
17 vote will be if, in fact, they vote, and then they're held to
18 give those releases. That's number one.

19 Number two, I think the release versus exculpation
20 for the committees, the future claims representatives, and the
21 professionals could be an exculpation clause. You could
22 bifurcate that out. You don't need to take them on as a
23 release issue --

24 MR. BERNICK: Yes.

25 THE COURT: -- I think. Now, I don't get a line item

1 veto, but I do think you could make this a cleaner issue under
2 the Third Circuit without taking on that --

3 MR. BERNICK: All right.

4 THE COURT: -- revision.

5 MR. BERNICK: Well, we still have to figure out how
6 to deal with the receipt of property, because having glanced
7 over Mr. Rosenblum's shoulder, the receipt of property also is
8 part of the -- basically, the Fresenius deal, as he showed it
9 to me, incorporates the language that we've now put into the
10 thing.

11 THE COURT: Oh.

12 MR. BERNICK: So I have to think that one through,
13 too.

14 THE COURT: Okay. Well, that one I can't help out
15 with at the moment, so --

16 MR. LOCKWOOD: Your Honor, one thing to keep in mind,
17 which is I believe -- and I'm doing this from memory, so I
18 could be wrong, but I believe the proof of -- the TDPs and the
19 proofs of claims, et cetera, require a release from any
20 asbestos claimant who submits a claim to the trust and gets it
21 resolved, to give a release to the asbestos-protected parties,
22 et cetera. So that's going to -- while 524(g), as we discussed
23 before lunch, doesn't deal with that, routinely the trusts deal
24 with that when the individual claimant doesn't, and it's part
25 of the release. And so it's possible that either we've got

1 that in it, or we can put that in it, and that might go a ways
2 toward resolving any concerns that somebody like Fresenius
3 might have, at least if not 100 percent, you know, a very large
4 extent. So we --

5 THE COURT: Okay.

6 MR. LOCKWOOD: -- can explore that, too.

7 MR. BERNICK: I could already sense that Mr.
8 Rosenblum's back there kind of expressing some open-eyed
9 optimism here.

10 THE COURT: Okay. All right. Mr. Fornari, I will
11 have to defer this issue until November 14th --

12 MR. FORNARI: Yes.

13 THE COURT: -- with respect -- I think so that the
14 debtor can take a look at the settlements that were previously
15 approved in this case numbers of years ago by the District
16 Court.

17 MR. BERNICK: Number 6 --

18 THE COURT: He's coming forward. Just a second, Mr.
19 Bernick.

20 MR. BERNICK: Oh, I didn't see him.

21 MR. FORNARI: Thank you, Your Honor. Not to delay
22 any matters, but the entire issue raised in the U.S. Trustee's
23 objection then is deferred until November 14th.

24 THE COURT: With respect to this issue of the -- of
25 whether or not the release has to be put on the front of the

1 ballot as a voting -- an affirmative vote issue.

2 MR. FORNARI: Yes, Your Honor. Thank you.

3 THE COURT: Yes. Okay, Mr. Bernick. Thank you.

4 MR. BERNICK: Item 6 are the mechanics of the TDP,
5 and I think it's principally Mr. Lockhead -- Lockhead. I did
6 have a client once named Lockhead. So it's Mr. Lockwood who is
7 going to be addressing that.

8 MR. LOCKWOOD: I'm beginning to think that's a
9 Freudian slip. Your Honor, the vast bulk of the Item 6 issues
10 are the Libby claimants. If you look at Mr. Bernick's chart,
11 you'll see there is Items 93, 95, 97, 98, 99, and 102 on the
12 chart. And I guess I had heard Mr. Cohn earlier to say that he
13 had accepted the notion that, you know, we were going to mostly
14 do confirmation objections at the confirmation hearing except
15 for two that he discussed with the Court earlier. And so
16 rather than go through some extended discussion of these, I
17 guess it might be appropriate to ask Mr. Cohn whether or not he
18 is accepting of the notion that these are confirmation
19 objections, and we'll deal with the confirmation hearing, or
20 whether he wants to press them as disclosure statement
21 objections now.

22 THE COURT: Mr. Cohn.

23 MR. COHN: Yes, Your Honor, the two that I was
24 referring to were the two issues we've -- regarding releases
25 and injunctions not -- I wasn't saying more broadly that we

1 were considering everything else we raised in our papers to be
2 confirmation issues. So we do need to go forward.

3 THE COURT: All right.

4 MR. LOCKWOOD: Well, the -- Your Honor, using the
5 chart as a sort of a handy shorthand here, you'll see -- let's
6 take -- start with Number 93. You'll see that essentially the
7 Libby claimants assert that the plan is unconfirmable, because
8 the TDP does not adequately address, for the most part, the
9 Libby claimants' assertions that they have unique, special
10 claims, et cetera. And for the reasons that I discussed
11 earlier, that is an evidentiary matter as to the extent which
12 the Libby claims are or are not special, and the extent to
13 which they should or should not be entitled to some kind of
14 differential treatment.

15 As I said earlier, we put in what the majority of the
16 Committee believed were appropriate responses to the Libby
17 claimants' assertions that they were different. We put in
18 various provisions. The Libby claimants, not I guess too
19 surprisingly based on their performance in this case today,
20 were not of the view that that's adequate. I -- again we would
21 be in a situation of debating those factual matters on the
22 basis of statements of counsel at this hearing in the
23 disclosure statement context if we were actually trying to
24 resolve these issues. And I don't really see any reason why we
25 should treat this particular set of objections any differently

1 than the one that Mr. Cohn wanted to assert as disclosure
2 statement objections earlier and --

3 THE COURT: If I look at -- 93 talks about the TDP
4 being deficient and discriminatory in various ways. 95 talks
5 about the plan being unconfirmable because of violating an
6 equal distribution policy. 97 talks about the plan being
7 unconfirmable because of providing different treatment for
8 claims in the same class. 98, because it denies a right to a
9 jury trial. 99, because it violates the right to have claims
10 allowed according to non -- I'm sorry -- according to
11 applicable non-bankruptcy law. And 102, because it allegedly
12 improperly disallows punitive damage claims and wrongful death
13 claims. I -- just from looking at this, I -- Mr. Cohn, I need
14 to know from you why those are disclosure statement issues as
15 opposed to plan confirmation issues, because they really do
16 seem to me to be plan confirmation issues.

17 MR. COHN: Well, Your Honor, the first one,
18 consistent with the discussion earlier, the Section 524(g)
19 injunction and issues that would arise concerning its
20 permissible scope -- I think consistent with that, Your Honor,
21 that first set would be confirmation -- or call it solely
22 confirmation issues.

23 THE COURT: All right.

24 MR. COHN: But the other ones, Your Honor -- you
25 know, some of those raise issues that are really pure issues of

1 law, and let me perhaps talk about most important of those, and
2 then, you know, you can tell me whether you want to go forward
3 today or whether you want to simply defer them to confirmation.

4 The essence of the Libby claimants' situation, Your
5 Honor, is that because of the severity of their asbestos
6 disease and because of the fact really that you die from Libby
7 asbestos -- is you have probability of death. Because of that,
8 Your Honor, and because of the fact that Libby claimants do not
9 have any problem proving causation, it was obvious that Grace
10 caused the harm to them. They have gotten a history of very
11 high verdicts and settlements compared to other asbestos
12 claimants, and the TDP recites that its purpose is to allow
13 claims or to liquidate claims at their tort system values.
14 And, of course, it cannot be otherwise, because under the
15 Buttner case the Supreme Court has said claims get allowed in
16 bankruptcy in accordance with their rights under state law.
17 And so if you have a claim with a tort system value of X under
18 state law, then you have a right to a bankruptcy claim of X.
19 So that's the basic problem that then runs through the TDP.

20 The equality of distribution issue, Your Honor,
21 Combustion Engineering says that the TDP must provide for
22 appropriate distribution within the asbestos claimant group.
23 That, Your Honor, is going to be fact based. I -- consistent
24 with what you said earlier, I'm not going to talk about that
25 right now, Your Honor. But that is the fundamental issue that

1 we will -- that we're raising here, which is that the TDP does
2 not provide for equality of distribution to the Libby
3 claimants.

4 But that plays out through a number of legal
5 deficiencies in the TDP as well. For example, Your Honor, the
6 right to a trial by jury. The way this -- these TDPs work, and
7 I know you've seen a number of them, is that you go through
8 several steps in the adjudicatory process within -- with the
9 trust, but ultimately if you can't reach agreement with the
10 trust, then what happens is you can resort to the tort system
11 to liquidate the amount of your claim. And that system -- that
12 provision is absolutely required, because, as you know, the
13 right to a trial by jury is preserved in bankruptcy cases. I
14 know that there's, of course, debate about how that plays out
15 in the estimation context, but there is no debate whatsoever
16 about how that plays out in the distribution context. And
17 this, the TDP, does provide for the fixing of the amount of
18 claims in the context of distribution for purposes of
19 distribution. And so, therefore, the Libby claimants have a
20 right to a trial by jury.

21 What the TDP does is it says, yes, it is true that if
22 you follow the myriad steps through the TDP and then you're not
23 satisfied with the result, you can go out and go get a jury
24 verdict. But then it says that that jury verdict will be
25 capped for purposes of your distribution under the case at the

1 so-called maximum value as defined in the TDP, and those
2 maximum values are far below what the history of verdicts and
3 settlements indicates is the tort system value of the Libby
4 claims.

5 So that provision takes away the Libby claimant's
6 right to a trial by jury. That's a simple legal issue. I
7 don't think it even depends on the correctness of the factual
8 premise that, in fact, these maximum values are far below the
9 tort system value of the Libby claims, because if you have a
10 right to trial by jury, that's what you have. You have a right
11 to trial by jury, which means you go out and you get a jury
12 verdict, you bring it back to the trust, and that's the allowed
13 amount of your claim for purposes of the TDP.

14 In addition, the TDP discriminates against those who
15 go out and do this. And, ironically, Your Honor, bear in mind,
16 you know, this is the -- this is a group of personal injury
17 lawyers who have drafted this thing, but they've decided that
18 if you go and you actually exercise your right to trial by
19 jury, then -- and you end up with a claim value through the
20 tort system, and to the extent that that value that you get
21 exceeds the trust's last offer to you, the amount of the
22 judgment does not get paid in accordance with the usual terms
23 of the TDP, but instead you get nothing on it for five years.
24 And then in years 6 through 10 you get paid, and all of this is
25 done without interest. So those provisions are clearly

1 designed to discriminate against those who exercise their right
2 to trial by jury, and I would respectfully submit, Your Honor,
3 that as a matter of law, a TDP with those provisions contained
4 in it will render the plan non-confirmable.

5 THE COURT: Okay. Well, I do believe that that's
6 going to be a plan confirmation issue, because it does affect
7 the plan. With respect to the right to trial by jury though, I
8 think as a legal matter, that does not -- the fact that a claim
9 will not be paid in full once it's allowed doesn't mean that
10 that deprives the person of the right to liquidate the claim in
11 whatever forum the law provides the right to liquidate the
12 claim in. It simply means that the debtor has a right to a
13 discharge of particular types of claims. 524 provides that the
14 debtor can discharge claims without paying them in full under
15 certain circumstances, and this is the circumstance.

16 Now, whether or not the distribution scheme in terms
17 of paying in years 6 to 10 after you've liquidated is fair and
18 reasonable, that may be an argument, but I don't think that
19 just because you liquidate at a jury trial level that your
20 judgment and the distribution scheme says it's not going to be
21 paid in full deprives you of the jury trial right. I'm not
22 sure that's the sine qua non, but nonetheless, I think --

23 MR. COHN: Well, I'm sorry, Your Honor, that was not
24 the argument, and we -- the issue is not whether claims get
25 paid in full at the amount of the jury verdict. We take it for

1 granted that the claims are going to be paid at a percentage,
2 and the TDP provides for there to be a payment percentage that
3 all claims are to be paid at except for claims determined by a
4 jury trial. They do not get that payment percentage. Whatever
5 it turns out to be, if you go out and you get a jury verdict,
6 and it's higher than the maximum value defined in the TDP for
7 your particular claim, then you don't get the payment
8 percentage multiplied by -- I'm sorry -- you don't get your
9 jury verdict multiplied by the same payment percentage as
10 everybody else. You get just --

11 THE COURT: The maximum value. Right. Because all
12 payment -- all claims within that class get paid the maximum
13 value and nothing more regardless of how the claim's
14 liquidated.

15 MR. COHN: Yes, Your Honor, and we would submit that
16 that deprives claimants of their right to trial by jury. That
17 you can't -- it is meaningless to say that you can go and get a
18 jury verdict if, when you then take it back to the trust, that
19 jury verdict does not determine the allowed amount of your
20 claim for purposes of then saying you get that amount times the
21 distribution percentage.

22 THE COURT: Okay. Well, I think it's an issue that
23 can be briefed, but I do think it's a confirmation issue. I
24 think the issue of the deferred payment in years 6 to 10 -- you
25 know, I'm a little bit more sympathetic to why it's going to be

1 stretched out over that period of time as opposed to a little
2 sooner. There may be some logic with respect to the financial
3 components of the trust that I -- that is not intuitive to me
4 that I'm not picking up on, but, nonetheless, that one I would
5 have to hear a little longer. But I do think it's a plan
6 confirmation issue, Mr. Cohn. I think you should talk to the
7 people who created the TDP.

8 MR. COHN: Well, I'd be delighted to talk with them
9 if they would talk with me.

10 THE COURT: Well, let me order them to talk to you.
11 Now they'll talk to you. They're ordered to talk to you.

12 MR. COHN: All right. Well, thank you, Your Honor.
13 I would say -- well, all right, let -- I guess we should then
14 move to other issues, although I have a feeling that you may
15 reach the same conclusion, but I at least want to provide the
16 opportunity in terms of timing to consider them now or to defer
17 them.

18 The TDP contains a categorical, I think, disallowance
19 of wrongful death claims, and this is significant, because
20 we've -- you know, Libby claimants die, and when they die,
21 their families typically get wrongful death claims under
22 Montana law, and these have been substantial. The value of
23 them will be in excess of \$300,000. Again, that's liquidated
24 value not necessarily what percentage you could expect to get
25 paid in the context of a bankruptcy. But they are valid claims

1 under state law, and you have Supreme Court precedent in the
2 form of the Nolan decision and reorganized F&I which says that
3 claims cannot be categorically disallowed under the Bankruptcy
4 Code, and yet this TDP apparently -- because it isn't quite
5 clear from the language of the TDP. But, apparently, this TDP
6 envisions that wrongful death claims will be automatically
7 disallowed. That, Your Honor, I would respectfully submit is
8 an issue of law which could be considered now.

9 THE COURT: All right. Mr. Lockwood.

10 MR. LOCKWOOD: First, Your Honor, I want to make a
11 comment. Mr. Cohn made some remark in response to Your Honor's
12 question about talking to the Committee and the Futures Rep and
13 announced that nobody talked to him. That is an outright
14 falsehood. Mr. Cohn -- as Mr. Bernick pointed out earlier,
15 this -- there have been negotiations between Mr. Cohn, Mr.
16 Cohn's clients, members of the Committee, counsel to the
17 Committee, for months going over this TDP on various things, A.
18 B, some of these objections that we are hearing today have
19 never been proffered by Mr. Cohn before they showed up in his
20 objection papers. Now -- and most of them, to the extent that
21 they have any surface plausibility, are largely so, because
22 they are basically that, superficial.

23 I'm going to take the two that Your Honor seemed to
24 have a little traction with Your Honor on. One is the right to
25 trial by jury. It is by no means clear that you have a right

1 to trial by jury in a 524(g) plan. For openers, as we have
2 discussed in -- various times in this and other cases, the
3 524(g) trust procedure is not an allowance procedure. It is a
4 post-consummation resolution of claims by a trust. And one of
5 the requirements for that trust that's built into the statute
6 is that the trust itself -- this is in Section
7 524(g)(2)(B)(ii)(v), and it talks about one of the requirements
8 of the trust is that, "The trust will operate through
9 mechanisms such as structured, periodic, or supplemental
10 payments, pro rata distributions, matrices, or periodic review
11 of numbers and the values of present claims and future demands
12 or other comparable mechanisms that provide reasonable
13 assurance that the trust will value and be in a financial
14 position to pay present claims and future demands that involve
15 similar claims in substantially the same manner."

16 Now, that section contemplates at least two different
17 things. One is the creation of payment percentages and the
18 monitoring of them in such a way as to minimize the possible
19 fluctuation in values arising out of the fact that you've got
20 some people at the front of the line, and you've got some
21 people at the back of the line. It is by no means clear that
22 an unrestricted right to juries is consistent with that. I
23 mean Your Honor is well aware of the vagaries of the jury
24 system. Indeed Mr. Bernick has waxed eloquent from time to
25 time on that subject.

1 With all due respect to Mr. Cohn's enthusiasm for the
2 value of his Libby claimants, he's not the only counsel who
3 represents people that have gotten blockbuster results out of
4 the jury system. For example, one of the things that Your
5 Honor may be familiar with is the so-called Edwards judgment in
6 this case. That's a judgment for \$43 million plus interest on
7 five claims, four of which were non-malignancy and three of
8 which, if my memory serves me, were unimpaired. With all due
9 respect, there's never been a judgment in Libby remotely
10 comparable to that. And you can talk about values of claims
11 and juries. Madison County, I believe Your Honor has heard
12 about --

13 THE COURT: We don't need to talk about this. We
14 need to get done today, Mr. Lockwood.

15 MR. LOCKWOOD: Okay.

16 THE COURT: Let's move on.

17 MR. LOCKWOOD: The point being that --

18 MR. BERNICK: I was just getting interested in this.

19 MR. LOCKWOOD: The point being is that it would be
20 highly inappropriate for Your Honor to decide at a disclosure
21 statement hearing with no evidence of the sort of things that
22 we're talking about based on Mr. Cohn's say so that his people
23 get higher verdicts and higher jury trials and 524(g) is an
24 absolute right to jury trials, et cetera.

25 THE COURT: I think what I said is that even if

1 there's a right to a jury trial, that I don't see how it's lost
2 by virtue of the fact that you're put into a payment percentage
3 in a matrix in the trust.

4 MR. LOCKWOOD: He's arguing --

5 THE COURT: I think that's what I said.

6 MR. LOCKWOOD: What his argument is, Your Honor, just
7 so the record is clear, he's saying first you apply the payment
8 percentage, but then you also have this capping the amount of
9 the jury verdict and the stretch out of the payments of the
10 jury verdict. And, frankly, the reason I gave my little spiel
11 about the vagaries of jury verdicts -- and this will, you know,
12 be the subject of evidence, if necessary, at the hearing. One
13 of the things that the trust has to do and the ACC and the FCR
14 and everybody else has to do is say, well, okay, if we're going
15 to give a trial by jury right here, which this trust does, how
16 restricted or unrestricted is it going to be to make the trust
17 work in the manner that the statute requires it to.

18 And, frankly, there is a disincentive to go through
19 the process and get a jury trial. This is supposed to be --
20 the matrix -- the expedited review is a standing settlement
21 offer by the trust to resolve claims for those people that want
22 to. The Libby claimants don't have to accept it.

23 You then have an alternative dispute resolution
24 process that goes in that the Court is familiar with. If you
25 don't like the results of that, ultimately, the plaintiffs'

1 lawyers, as Mr. Cohn pointed out, have built in something that
2 preserves a trial by jury as to the merits of the claim,
3 liability, value, a bunch of things. But there is this
4 limitation, and the justification for that limitation is more
5 or less what I have in a somewhat simplified fashion described
6 it as. But again, I mean the -- we're not -- it seems to me
7 we're not here today for Your Honor to make a ruling about
8 whether you think my presentation about that rationale is or is
9 not a winner.

10 The other thing is this categorical disallowance of
11 wrongful death claims. He also complains about the categorical
12 disallowance of punitive damage claims, and he cites Nolan,
13 which was a punitive damage claim case. Well, as Your Honor
14 decided, I believe it was Pittsburgh Corning, there's a
15 difference between a judgment for punitive damages or wrongful
16 death, neither of which the trust eliminates. It's -- we tried
17 it in Pittsburgh Corning. Your Honor, cited Nolan to us and
18 said we couldn't do it.

19 But in a case, for example, where you're paying less
20 than 100-cent dollars percentages to people, there's -- there
21 is a legitimate question about what kinds of claims you're
22 going to pay for. Punitive damages -- anybody in the world --
23 the Libby claimants aren't the only people that could assert
24 punitive damages. Anybody that was a claimant except in a
25 state that disallows them entirely -- and I'm not sure how many

1 states there are, but there's certainly plenty of states you
2 could allege punitive damages. Libby claimants aren't unique
3 to that. And the reason that you disallow them is, because the
4 feeling is you ought to get paid for your compensation for your
5 injuries rather than allowing people at the front end of the
6 trust to get big punitive damage verdicts. In a sense it's
7 similar to the jury trial issue in that regard. You're trying
8 to create a structure that, you know, gives everybody a
9 reasonable shot at getting compensated for their injuries.

10 Wrongful death, the fact is that the wrongful death
11 -- when somebody dies, you wind up having their claim
12 bifurcated in a sense. The heirs and the personal
13 representative will get those elements of the trust that remain
14 in the estate. There are certain statutory beneficiaries of
15 wrongful death claims. The way that's -- the way the trusts
16 are set up to work is that the idea is that all of those people
17 whose rights arise out of the single claim of the decedent at
18 the end of the day will have to agree on how to whack up, if
19 you will, among themselves the values. And that's why, as will
20 be explained, to the extent again necessary at the confirmation
21 hearing, the way the trusts work is that the estate has to get
22 releases from the holders of the wrongful death claims in order
23 to get paid on a claim. And what -- in order to get those
24 releases, which are not involuntary, the heirs and the wrongful
25 death beneficiaries have to figure out among themselves how to

1 divide up the proceeds of this what was again a single claim
2 here.

3 And Mr. -- Nolan doesn't apply to that anymore than
4 it applies to unliquidated and unadjudicated -- I'm having a
5 senior moment here -- punitive damage claims. And so again I
6 mean this is complicated stuff, these TDPs. This TDP, other
7 than the special provisions for Libby claimants that have been
8 affirmatively put into it, these provisions about wrongful
9 death and punitive damages are in every single trust that Your
10 Honor has confirmed today. The Libby claimants are the only
11 people that have now shown up to complain about them, and again
12 all I can say is that it seems to me that if we're going to
13 have a debate on this subject, the proper place to do it is at
14 the confirmation hearing with evidence and briefing and not
15 sort of naked assertions of fact and objections and arguments
16 of counsel.

17 THE COURT: Well, I agree that if there is -- I
18 believe that these are plan confirmation issues, and I think we
19 should be doing this at the plan confirmation hearing. So I
20 think we need simply a list of the issues that are going to be
21 plan confirmation objections. These appear to be in that list,
22 and they should be teed up for whatever is going to be
23 appropriate for briefing at that time. So let's get back to
24 the objections. I think that will perhaps be something that
25 can be addressed today, because I don't think these can be.

1 So, Mr. Cohn, I'm going to defer these to the confirmation
2 issues hearing.

3 MR. COHN: Thank you, Your Honor.

4 MR. BERNICK: I don't know if there's anybody else
5 that wants to speak to the mechanics of the TDP. We have --

6 THE COURT: Montana or Fireman's Fund?

7 MR. BERNICK: I don't want to prompt anybody to rise,
8 but I'm just asking if there's anybody else who's going to
9 address that. Here we go.

10 THE COURT: Mr. Demmy.

11 MR. DEMMY: Yes, Your Honor, I just rise, because I
12 wanted to reinforce my earlier comments. I don't intend to
13 pursue any of the confirmation objections really for -- that
14 are noted on 6 and 7, so I'll just confirm that for two reasons
15 really. One is that as to really all of these in prior
16 colloquy with the Court, the debtor has advised -- and it's set
17 forth in a chart that additional language is going to be added
18 to the disclosure statement, which deals with many of these on
19 a disclosure basis, so we'll look at that language.

20 And part of what our objection was, was that it
21 wasn't dealt with either in the disclosure statement or
22 otherwise. So we're not going to proceed with that. And also,
23 as I stated earlier, we think that many of these issues can be
24 discussed among the parties, and we stand ready to do that.

25 THE COURT: All right. Okay. I think that takes you

1 to the insurance issues, Mr. Bernick.

2 MR. BERNICK: Well, it takes us to the insurance
3 issues, and I think that effectively if you go through the
4 chart, you'll see that there are -- excuse me -- there's a list
5 of these issues that appears beginning of 109 for Fireman's
6 Fund, and then 105 for CNA, and, effectively, they all speak to
7 the issue of insurance neutrality. And on the issue of
8 insurance neutrality, we would again suggest to the Court that
9 is an issue for confirmation.

10 I would add that the issues that have been raised are
11 not novel issues. The question of whether the assignment
12 provisions of the plan or whether the TDP of the plan affect
13 contractual insurance rights is something that is not at all
14 unique to this case. So we would ask that the items -- the
15 chart items that are listed here, 105 and 109, 11, 12, 13, and
16 14, be raised if they're going to be raised in connection with
17 the plan confirmation process.

18 THE COURT: All right. Is the debtor going to try to
19 work with these parties to get some language that's acceptable
20 to both sides?

21 MR. BERNICK: Yes. Well, I know that that's already
22 happened in the case. I really do think that insurance is --
23 you know, it's cut from the same cloth that has evolved in
24 connection with the other cases, but these are all matters
25 where when it comes to the disclosure statement itself, you

1 know, we -- and I think that Mr. Freedman has gone through
2 that. We've expressed pretty much an open door policy to
3 working out language. I mean it is logistically a challenge to
4 deal with everybody, but we're committed to do that. There's
5 no hesitancy about that. But substantively on insurance we
6 think also this is pretty much another time round the same
7 basic track that's been worn pretty well in connection with
8 prior cases.

9 THE COURT: Okay. Other than to try to work with the
10 debtor to get some acceptable language for insurance
11 neutrality, does anybody wish to be heard on Number 7?

12 (No verbal response)

13 THE COURT: Okay. Mr. Bernick.

14 MR. BERNICK: Okay. I think that that --

15 THE COURT: Mr. Freedman.

16 MR. BERNICK: -- brings us to the last category which
17 Mr. Freedman is going to cover, and these are the items of
18 disclosure where we believe that the matters come to the point
19 where it's ripe, and we don't believe that it should be
20 necessary to include these statements, and then I think we'll
21 be done for this session.

22 THE COURT: All right.

23 MR. FREEDMAN: So again, Your Honor, what we're now
24 talking about are disclosure statement objections which the
25 debtor believes the Court can now overrule and permit us to go

1 forward without making the requested disclosure. First off,
2 there were two objections filed by the Crown, which would've
3 fallen into this category, Objection 18 and Objection 17.
4 After the representations of the Crown counsel, I won't take up
5 anybody's time on those.

6 THE COURT: All right.

7 MR. FREEDMAN: Scotts has filed an objection that's
8 identified on the chart as Number 21, and that has to do with a
9 complaint that the disclosure statement fails to disclose why
10 Scotts' claim, if they are indirect PI trust claims, are not
11 state common law claims that accrue close to confirmation and
12 not subject to a discharge. That just fundamentally misstates
13 what Section 524(g) requires.

14 I point the Court to Page 8 of Scotts' objection, and
15 if the Court indulges me, I'll read the language of what they
16 say is wrong with the plan. They say, "Moreover, if the joint
17 plan proponents intend to treat Scotts' claims as indirect PI
18 trust claims, then they must further provide full disclosure as
19 to why the Scotts' claims are not state common law claims that
20 accrue post-confirmation and are, therefore, deemed post-
21 confirmation claims against the reorganized debtors not subject
22 to compromise and discharge in a plan," citing the Frenville
23 case.

24 That law just simply doesn't apply in the context of
25 Section 524(g) and disclosure of the kind that they're asking

1 is inappropriate. We request that the Court deny that request
2 for further disclosure.

3 THE COURT: Okay. Ms. Cobb.

4 MS. COBB: Thank you, Your Honor. Ms. Tiffany Cobb
5 on behalf of the Scotts Company. And I don't know if it might
6 make some sense to go through each of the Scotts' objections,
7 because there is quite a lot of overlay. To put this in its
8 proper context, there really are two separate issues for the
9 Scott Company.

10 One deals with the extent to which the Scotts Company
11 may have post-confirmation indemnity or other state law claims.
12 I believe that the debtors have indicated this morning that
13 they are going to provide as yet unreceived clarifying language
14 for the disclosure statement, and unless and until we see that
15 clarifying language, it's a little bit of a guessing game. But
16 the point raised in the objection was if the debtors' intent is
17 to classify those state law future common law indemnification
18 or state law -- other state law claims and to capture them into
19 their definition of the asbestos personal injury claims, then
20 we are asking for adequate information in the disclosure
21 statement to so state that and to explain how that
22 characterization -- classification can be accomplished given
23 Third Circuit authority in the Frenville case. We disagree
24 that the Scotts Company has an asbestos claim.

25 MR. FREEDMAN: Well, Your Honor --

1 THE CLERK: Use the microphone.

2 MR. FREEDMAN: -- to the extent that we're getting
3 into this issue that may well end up being a confirmation
4 issue, but the issue would then be if Scotts' potential claims
5 in the future fall within the category of indirect trust
6 claims, then under Section 524(g) they would still be channeled
7 to the trust, and they would still be subject to their
8 treatment as a PI trust claim. To the extent that Scotts wants
9 to raise that treatment as a disclosure statement issue, it
10 should be considered in that context. But to the extent that
11 Scotts is asking for some kind of disclosure, that they have
12 some rights that are different than what I've just articulated,
13 we think that that would be an incorrect statement, and we
14 don't believe that there is any further need for disclosure.

15 THE COURT: Okay.

16 MS. COBB: Well, and just to be clear, I had
17 understood the debtor's argument here today to be overruled a
18 Frenville argument. I don't think that's appropriate today.
19 We have heard time and time again we are here today to address
20 whether or not there's adequate information in the disclosure
21 statement. And it may be -- it may be unnecessary to go down
22 that path depending upon the --

23 THE COURT: Show me in the disclosure statement
24 specifically where Scotts' claim is addressed, what you're
25 arguing about with respect to this Scotts claim. The whole

1 issue is whether or not the disclosure statement adequately
2 addresses the Scotts claim. Let me just see it in the context
3 in the disclosure statement.

4 MR. FREEDMAN: Your Honor, I might be able to help a
5 little bit in the sense that the debtors intend to supplement
6 the disclosure statement, as I believe I explained earlier, to
7 provide a much more extensive discussion of what constitutes an
8 indirect trust claim and the kind of claim that would fall into
9 that category, and that discussion will include language that
10 would make it clear that Scotts' claims, whether they are
11 claims that exist today or if the Frenville ruling might apply,
12 would end up being demands, that is claims that don't exist
13 today but may come into existence in the future, would still be
14 channeled to the trust under Section 524(g). We will make all
15 of that clear in the disclosure statement. We agree that there
16 should be further exposition in the disclosure statement on
17 those points.

18 THE COURT: Okay. Well, if that's the case, I think
19 you two need to work out some language. And to the extent that
20 Scotts still isn't satisfied, then I need to hear this in
21 November. I think at this point I'm ruling on language that
22 isn't here, so why don't you two talk and see if you can't get
23 all of Scotts issues addressed, and if they're not addressed,
24 then I'll take this on in November. I think at this point I'd
25 be giving a ruling on something that doesn't exist. It doesn't

1 really make sense.

2 MR. FREEDMAN: Your Honor, there are other --

3 THE CLERK: Use a mike.

4 MS. COBB: If you're moving on, know I'd like to make
5 one additional point --

6 MR. FREEDMAN: Okay.

7 MS. COBB: -- while we're on this. Your Honor, if I
8 understood the discussion before the lunch break regarding
9 classification to be correct, again -- I mean I'm being asked
10 to speculate at this point until we've seen the clarifying
11 language.

12 THE COURT: Yes.

13 MS. COBB: But certainly to the extent that with that
14 clarifying language the Scotts Company disagrees with that
15 classification, it would be our understanding that as with
16 other interested parties today who have raised similar
17 classification objections, that there would need to similarly
18 be the two different voting --

19 THE COURT: Yes, you just -- everyone who is unhappy
20 with their classification is going to file something, and in
21 whatever the time schedule is that's worked out that says I
22 think I should be in Class X, and whatever class you think you
23 should be in, the debtor will have the votes counted the way
24 the debtor thinks they should be counted and the way the
25 objecting party thinks they should be counted. And if it makes

1 a difference, then I'll have a classification issue I have to
2 determine. If it doesn't make a difference either way, it
3 won't make a difference. I don't have to worry about it. So
4 far, in every plan I've seen it wouldn't have made a
5 difference, so I may not have to worry about it. If I do, then
6 I'll figure it out then.

7 MS. COBB: Okay.

8 (Pause)

9 MR. FREEDMAN: Your Honor, just to short circuit it,
10 BNSF has filed a similar kind of objection. It's identified as
11 Number 25 in the chart and goes to the same point that is
12 appropriate disclosure about how BNF's claims would be properly
13 treated and whether or not the potential future claims that
14 relate to BNF -- BNSF's rights would be dealt with under the
15 plan, and we should just defer dealing with that issue in the
16 same way.

17 THE COURT: Okay. I think to the extent the debtor
18 is going to attempt to work out new language, there isn't
19 really much point in discussing anything today, because I don't
20 have anything rule on today. So, counsel, do you agree simply
21 to defer this until November?

22 MS. HARANSON: That's fine, Your Honor.

23 THE COURT: All right. Thank you.

24 MR. FREEDMAN: Again for Scotts and BNSF there are
25 two objections that raise a similar issue about the impact of

1 their asserted rights against the Grace insurance policies.
2 That would be BN -- well, that would be Scotts' objection
3 Number 24 and BNSF's objection Number 27. And the question
4 that was raised in these objections as a disclosure statement
5 matter was -- the objection that was raised was that the
6 debtors didn't properly disclose that there was some impact on
7 their -- these parties' rights to certain insurance policies.

8 The disclosure statement makes clear that it is only
9 transferring the debtors' rights to the trust -- the debtors'
10 insurance rights to the trust. There's nothing in the
11 disclosure statement that suggests that any third parties'
12 rights are being transferred to the trust, and the debtors
13 don't believe that there's any need for further disclosure in
14 the disclosure statement that goes to those issues.

15 THE COURT: Well, okay, but does it hurt to put a
16 sentence in that says that debtor is not transferring any third
17 parties' rights to insurance policies to the trust?

18 MR. FREEDMAN: We're happy to do that, Your Honor.

19 THE COURT: All right. Add a sentence. Thank you.

20 MS. COBB: If I may on that?

21 MR. FREEDMAN: Sure.

22 MS. COBB: Your Honor, Tiffany Cobb on behalf of the
23 Scotts Company. I appreciate that suggestion, and I agree with
24 it, but I think we need to go a little further than that.
25 There is a -- in looking at the chart for the Scotts Company,

1 24 -- Number 24, and consistent with what debtors' counsel has
2 said, it's interesting to look at the words used. It says,
3 "The plan on its face only purports to transfer the debtor's
4 insurance rights, not any alleged rights that the Scotts may
5 have. That is very different, Your Honor, than saying the plan
6 on its face does not purport to affect any rights --

7 THE COURT: Well, it may affect rights.

8 MS. COBB: -- that the Scotts may have.

9 THE COURT: It may affect rights. I mean how does
10 anybody know what it's going to affect?

11 MS. COBB: Well, and we are looking for a statement
12 or statements in the disclosure statement to explain what the
13 debtors' intent is with respect to --

14 THE COURT: It has that in it. It says, "It purports
15 to transfer the debtors' rights, not any alleged rights that
16 Scotts has." That's it's intent.

17 MS. COBB: What is its intent, for example, with
18 respect to the -- there is no -- well, let me give one of many
19 examples. I don't know if that intention means that the Scotts
20 Company's claims against the insurance carriers will now be
21 against the trust with the asbestos trustee stepping in the
22 shoes of Grace with litigation occurring to adjudicate the
23 rights that Your Honor has said that the Scotts Company is
24 entitled to litigate, or if it means that through this --
25 through the language in this disclosure statement the -- well,

1 there's an absence of language whether their intention is to
2 essentially release those rights --

3 MR. FREEDMAN: Your Honor --

4 MS. COBB: -- because of the broad release language
5 given to the insurance carriers. All we're looking is for a
6 statement or an explanation from W.R. Grace as to what their
7 intent is vis-a-vis the Scotts Company's claim against the
8 insurance carrier. There's nothing in this disclosure
9 statement period as to what the affect of this plan is on the
10 Scotts Company's claims against the insurance carrier.
11 Nothing.

12 MR. FREEDMAN: Well, Your Honor, counsel --

13 THE CLERK: Use a microphone.

14 MR. FREEDMAN: One of these days I'm going to learn.
15 Counsel has raised sort of two independent points, one of which
16 we've agreed to, and one of which she keeps on coming back to
17 that is impossible to speak to at this point. We've agreed
18 that we will add a sentence to the disclosure statement that
19 says that the debtor is only transferring its rights and making
20 clear that we're not transferring anybody else's rights. And
21 it will be absolutely clear that Scotts' rights or BNSF's
22 rights or anybody else's rights are not being affected by our
23 transfer.

24 Once the trust has those rights, then it will be up
25 to the trustees to decide how to access the insurance, how to

1 deal with the insurance, and so forth. And it may be that in
2 the course of that some rights that Scotts has might be
3 affected just as happens in every situation where you'd have
4 multiple beneficiaries of an insurance policy. It's impossible
5 to provide disclosure on that point other than to indicate that
6 the debtors are only seeking to transfer their rights. So we
7 think that our disclosure with the sentence the Court asked for
8 would be all that's required.

9 THE COURT: I think that's all the debtors can do.

10 MS. COBB: Well, what debtors' counsel just stated on
11 the record is what we're looking for them to say in their
12 disclosure statement. I believe counsel stated that they're
13 only intending to transfer whatever rights the debtor has, and
14 they are not intending to affect the Scotts Company's rights.
15 If that's the case, then not say it in the disclosure
16 statement.

17 THE COURT: He said he would indicate that their
18 intent -- that the debtor is transferring the debtors' interest
19 in the policies not third parties' interests in the policies.
20 That's what he can state, and I agree. And to the extent that
21 it's not clear, they'll so state. Okay. And that thereafter
22 it'll be up to the trust to access and deal with the insurance
23 policies.

24 MS. COBB: Are you interpreting that to mean then,
25 Your Honor, that the Scotts Company's declaratory judgment

1 action would then continue?

2 THE COURT: I'm not interpreting it to do anything.
3 I'm simply ruling on what's adequate information in the
4 disclosure statement, and it seems to me that the issue is
5 what's the debtor transferring.

6 MS. COBB: Well, I -- respectfully, I think that the
7 way that the debtor is intending to affect our rights needs to
8 be spelled out, so we can -- I mean do we have a due process
9 issue here? I don't know, because they aren't telling me.

10 THE COURT: How does the debtor -- how can the debtor
11 affect your rights? You're asking for a legal conclusion --

12 MS. COBB: I'm not asking --

13 THE COURT: -- that is not --

14 MS. COBB: I'm looking for their intent.

15 THE COURT: You are asking for a legal conclusion and
16 probably a statement of fact that may or may not assist in a
17 particular litigation, and I'm not going to compel the debtor
18 to do that. There is a litigation issue going on. This is the
19 disclosure statement. It is not an adversary proceeding. That
20 adversary proceeding is stayed, and I'm not going to compel the
21 debtors to take a position in an adversary proceeding that may
22 affect their substantial rights in this disclosure statement.
23 The objection's overruled. I've said what they have to add.
24 That's it. That's what you're getting.

25 MS. COBB: Well, I apologize. I was not looking for

1 the debtors' position on the merits. We can --

2 THE COURT: Well, but you are.

3 MS. COBB: No, I --

4 THE COURT: You're asking for a statement of intent.

5 MS. COBB: To me, that's different, and I apologize
6 if I wasn't artful in the way I explained this. The Scotts
7 Company has certain rights. We can disagree as to what those
8 are. We -- I understand that, Your Honor. That issue has not
9 been litigated. That's not the question. The question is
10 whatever rights those are, the disclosure statement should tell
11 us how they're going to be affected.

12 THE COURT: The debtor doesn't even know what rights
13 you have potentially. How can the debtor say what affect the
14 debtor is going to have on rights that the debtor doesn't even
15 necessarily agree that Scotts has? That hasn't been litigated
16 yet. It's an issue that Scotts is making a claim against
17 policies that the debtor doesn't even know yet at this point in
18 time whether the debtor has. I mean the debtor's disclosed
19 certain policies. Scotts may or may not know that it -- or the
20 debtor may or may not know that there are other policies out
21 there.

22 The debtor cannot make the assertions in good faith
23 that you're asking the debtor to make. What the debtor can say
24 is we know we have certain policies. We're transferring those
25 policies to the trust. We don't intend to transfer anybody's

1 interests in those policies but ours. And the debtor is
2 willing to say that and to clarify that whatever rights anybody
3 else has in those policies are not being transferred, and
4 that's what the debtor can say. We're not transferring anybody
5 else's interests but ours. The debtor can say that, and that's
6 what the debtor's willing to say.

7 MS. COBB: Okay. Well, it still remains unclear what
8 happens to the declaratory judgment action if the plan as
9 written is confirmed.

10 THE COURT: Well, that you folks need to talk about.
11 If, in fact, there's an affect on the declaratory judgment
12 action, that's a different issue than transferring the
13 insurance policy. So that you should discuss.

14 MR. FREEDMAN: We're pleased to talk to counsel --
15 we're pleased to talk to counsel about that issue.

16 THE COURT: Okay.

17 MR. FREEDMAN: Your Honor, the next objection is
18 Number 48 filed by Continental Casualty, CNA. That objection
19 says that they need to know if the injunction under Section 8.2
20 of the plan -- they need to know in the disclosure statement if
21 the injunction under Section 8.2 of the plan prevents the
22 insurers once the trust is up and running from taking discovery
23 with respect to their rights with -- under the debtors and if
24 they're exercising state law rights limits somehow their
25 discovery. The debtors do not believe that there's anything in

1 the plan that even raises the prospect of some limitation on
2 insurers' rights to take discovery in proceedings that are
3 unrelated to this Chapter 11 case, and particularly once the
4 effective date has passed and there's no stay, that binds them.
5 So -- or if there's litigation with the trust, and the trust is
6 seeking to access coverage under the policies and there's some
7 sort of state law -- State Court litigation with respect to a
8 dispute that involves the trust accessing coverage under the
9 policies and the insurers need to take discovery, there's
10 nothing in the plan that suggests that they wouldn't have any
11 and all of their rights. We don't see any need for further
12 disclosure on that kind of a point.

13 THE COURT: Okay. Does CNA want to be heard on this
14 issue?

15 MR. GLOSBAND: Dan Glosband for CNA. Just to confirm
16 what Mr. Freedman said, we would expect to put something like
17 what he just said into our neutrality proposal.

18 THE COURT: In the neutrality proposal?

19 MR. GLOSBAND: If the plan is to be insurance
20 neutral, it's got to be neutral in respect to our discovery
21 rights as well, and so we're intending to have conversations
22 with them about the specific details of the neutrality
23 language, and I would think that would be an appropriate thing
24 to add just to confirm that what Mr. Freedman said will apply
25 to us post-confirmation.

1 THE COURT: Okay. You folks talk.

2 MR. FREEDMAN: We'll discuss the propriety of that.
3 Your Honor, the next group of objections are all ones filed by
4 Fireman's Fund. They are objections Number 55, 56, 58, 59, and
5 64, and I believe I can summarize all of these objections in
6 the following way.

7 What they do is they request that there be disclosure
8 about how the trust, once it's up and running, will access
9 coverage that is relating to open insurance policies. And the
10 debtors are not in a position to write a hypothetical
11 description of how a trustee might decide to access coverage
12 in, you know, two years when the trust is up and running. So
13 we don't believe that there's any need for or any requirement
14 of disclosure with respect to those kinds of issues, and we'd
15 ask the Court to overrule any requests to supplement the
16 disclosure statement with those kinds of descriptions.

17 THE COURT: Mr. Demmy.

18 MR. DEMMY: Yes, Your Honor, my response is very
19 simple to this group, and it relates -- I think all the
20 objections that are raised in the group that were just
21 identified relate in some way to the -- at the time the
22 objection was filed the missing exhibits. The transfer
23 agreement, which was filed Saturday, and the cooperation
24 agreement, which has not been filed yet, I think that some of
25 what we're looking for may very well be in those documents. My

1 suggestion would be since we just -- we had zero business days'
2 notice of the -- or opportunity to look at the transfer
3 agreement -- we haven't yet seen the cooperation agreement --
4 we ought to put these over to November 14 to give us an
5 opportunity just to look at those agreements and see if we can
6 come to a landing on this grouping.

7 THE COURT: All right.

8 MR. DEMMY: Thank you, Your Honor.

9 MR. FREEDMAN: Your Honor, I don't have a problem --

10 THE CLERK: Use a mike.

11 MR. FREEDMAN: I don't have a problem with counsel
12 raising any objections that are implicated by the agreement,
13 but we'd like to know that we don't have to be providing
14 disclosure on hypothetical situations which --

15 THE COURT: Well, you don't need to provide
16 disclosure on a hypothetical situation, because you obviously
17 can't describe how the trust will access coverage. You won't
18 be part of the trust, so that's -- that issue I think, as
19 stated, is -- has to be overruled. But, nonetheless, I think
20 Mr. Demmy's correct that some of the exhibits themselves may
21 provide the information that they're looking for. So to the
22 extent that there may be objections that are not resolved,
23 they're going to come up November 14th, so I think you folks
24 can talk. But, no, the debtor cannot provide disclosure about
25 a hypothetical that the debtor won't be involved in.

1 MR. DEMMY: Your Honor, as a matter of concept, I
2 don't disagree with the Court's statement, and I think that
3 once we have a chance to look at the documents, if there's
4 something about them that still we have a problem with, we'll
5 raise it, and we'll deal with it.

6 THE COURT: Okay.

7 MR. FREEDMAN: Counsel for Fireman's Fund may want to
8 just remain at the podium, because there are about three of
9 them that relate to him now. Objection Number 57 asks for a
10 disclosure with respect to the proposition that the claims
11 liquidation process may have the effect of diminishing
12 recoveries by holders of asbestos PI claims from the asbestos
13 PI trust, and in particular, I gather the real substance of
14 their objection is that the TDP might have some adverse affect
15 on the rights of the trust vis-a-vis the insurance coverage
16 that's still open in terms of being able to access that
17 coverage, and they want further disclosure on that.

18 We don't think that such disclosure's appropriate
19 beyond what we've already said that we would disclose, and the
20 debtors have agreed in the disclosure statement to add language
21 that we'd be glad to work with the insurance companies to pin
22 down that relates to the general proposition that insurance
23 proceeds are going to be subject to -- recovery of insurance
24 proceeds are going to be subject to defenses of the insurance
25 companies, and that the asbestos PI trust in its attempt to get

1 access to the insurance coverage will have to address those
2 defenses.

3 THE COURT: Okay.

4 MR. DEMMY: Your Honor, as to fifty -- I don't think
5 we have an issue with 57. I think in parts it's a transfer
6 agreement problem, and we're deferring that. And also the
7 debtors in the chart indicated they were putting some language
8 in about the risk factors and so forth, so we'd have to take a
9 look at that as well. So I don't think we have anything to
10 talk about on 57 at the moment.

11 THE COURT: Okay.

12 MR. FREEDMAN: On Pages 19 and twenty -- through 22
13 of the Fireman's Fund objection they essentially ask that the
14 debtors disclose that under the TDP they're agreeing to fund
15 and have to pay non-meritorious claims, and the --

16 THE COURT: That's overruled.

17 MR. FREEDMAN: Okay.

18 THE COURT: Obviously, the debtors are not going to
19 agree that they're going to pay non-meritorious claims, and
20 that the Court would not be confirming a plan in which the
21 debtors would agree to pay non-meritorious claims. So I --

22 MR. DEMMY: I'm not going to ask Your Honor to go
23 back on that. I think what we were getting at was a more
24 fundamental issue. In the disclosure statement there are only
25 two pages out of about 140 that relate to the estimation

1 proceedings, and only about a paragraph that relates
2 specifically to the settlement that is -- was made in
3 connection with the estimation proceedings, and we felt that
4 the disclosure statement would be benefitted by a more fulsome
5 discussion with respect to the factors that went into the
6 settlement in connection with the estimation. I think really
7 that's what the objection was getting to, not to how it was
8 characterized, but I think Your Honor might have the same
9 response. But I did want to make the record clear on that
10 point.

11 THE COURT: All right. Well, Mr. Lockwood, would the
12 asbestos personal injury claimants benefit from more detail
13 with respect to how the settlement numbers were arrived at,
14 because it seems to me that this objection, although raised by
15 an insurance company, is for the benefit of the asbestos
16 personal injury claimants.

17 MR. LOCKWOOD: Your Honor, the asbestos claimants got
18 subjected to personal injury questionnaires, over 100,000 of
19 them, a settled claim bar date notice.

20 THE COURT: It's a yes or no answer.

21 MR. LOCKWOOD: It's a -- it was a global deal. No.

22 THE COURT: Okay.

23 MR. LOCKWOOD: They don't need anything more.

24 THE COURT: I don't think they need anything more,
25 Mr. Demmy. Thank you. Okay. That one's overruled. I think

1 they'll probably have understood how it finally came to pass,
2 Mr. Demmy. Okay, Mr. Freedman.

3 MR. FREEDMAN: The last one that was raised by
4 Fireman's Fund on Page 29 of their objection is that the
5 debtors failed to disclose the effect of any substantive
6 consolidation on claims made under the non-settled insurer
7 policies. Basically, the point here is that the plan does
8 provide that a claim filed against one of the debtors is deemed
9 to be a claim filed against all of the debtors, and that the
10 debtors are substantively consolidated for that purpose.
11 There's no intent in providing that -- that there was any
12 limitation on the substantive rights of the insurers with
13 respect to their policies, and, therefore, we don't believe
14 that there's any need for further disclosure that relates to
15 that point. It has to do more with a issue of permitting
16 claims to be against the consolidated debtors than affecting
17 the rights of insurers with respect to which of the debtors
18 they're responsible for covering.

19 THE COURT: Well, Mr. Demmy, if you don't think it's
20 clear, this one may affect the insurance companies.

21 MR. DEMMY: Your Honor, I would accept what the
22 debtor put in the chart, which was a little fuller statement or
23 rendition of Mr. Freedman's statement with regard to -- that
24 there was not to be any affect on insurers. There's -- it's a
25 one-sentence -- the second sentence in the chart for Number 62,

1 that second sentence would be acceptable to us.

2 THE COURT: All right.

3 MR. DEMMY: So I think that adequately explains what
4 Mr. Freedman just said.

5 MR. LOCKWOOD: Your Honor, we're happy --

6 THE COURT: I'm sorry.

7 MR. LOCKWOOD: Your Honor, we're happy to have the
8 debtors put in a sentence that says that substantive
9 consolidation is not intended nor shall it operate to somehow
10 or another result in the insurers insuring an entity that they
11 didn't insure.

12 THE COURT: All right. Well, are you happy with that
13 -- with the information that's in Number 62 as the response to?
14 If so, that seems to be a pretty fair explanation.

15 MR. FREEDMAN: The debtors will include that
16 language.

17 MR. LOCKWOOD: Yes, that's fine, Your Honor.

18 THE COURT: All right. Just add that then.

19 MR. FREEDMAN: All right. Your Honor, there are
20 several objections that were filed by the Libby claimants.
21 Most of those would be handled by Mr. Lockwood. One I'd like
22 to just address. That's Number 32 where the Libby claimants
23 say that the disclosure statement violates the requirements of
24 due process of law, because (1) it does not provide adequate
25 time to object, (2) lacks basic information necessary for a

1 meaningful response, and (3) allows the plan proponents to
2 modify the plan without further disclosure.

3 As to the third one, we've already made clear that
4 the plan proponents could only modify the plan as committed
5 under Section 1127, which clearly provides that after a
6 modification is made claimants who have previously voted for
7 the plan and are impaired by that modification will have a
8 chance to vote again, and after the effective date no
9 modifications can be made to the plan. So we don't believe
10 that that has any merit at all and requires any further
11 disclosure.

12 With respect to the basic information necessary for a
13 meaningful response, we're certainly working with all the
14 parties who have made useful suggestions to add information
15 that we believe is appropriate, and we think that that's a
16 sufficient response to this point.

17 And as to the adequate time to object, as we pointed
18 out in our brief, number one, we provided all the notice that
19 is required both under the Bankruptcy Code and the local rules.
20 And, number two, the Libby claimants were able within that time
21 to file a 102-page objection, so they certainly had time to
22 consider what the plan provides. And I will note, as Mr.
23 Lockwood indicated, that the Libby claimants were very much
24 involved in the negotiation of the TDP we understand from the
25 Creditors' Committee. So they certainly have had plenty of

1 notice about that very important provision of the plan. So we
2 don't think that any of those objections require further
3 discussion.

4 THE COURT: Mr. Cohn.

5 MR. COHN: Your Honor, as to the first two points,
6 I'll just rest on my papers, but I did want to address the
7 third, which I think Mr. Freedman addressed first, which is the
8 matter of how the plan gets amended and what notice and what
9 disclosure there is for due process purposes. And I really
10 just wanted to ask whether we could have a clarification for
11 the record that what we mean by modification of the plan
12 includes a modification of the exhibits of the plan.

13 MR. FREEDMAN: Your Honor, the exhibits to the plan
14 -- and I think Mr. Cohn's probably talking about the TDP, and
15 so Mr. Lockwood could address that. But the exhibits to the
16 plan carry within them certain provisions that relate to
17 whether or not the parties to those exhibits can modify them
18 under certain rules and standards that are laid out in each
19 exhibit. All of these are transactional documents of one kind
20 or another. They're ubiquitous in the sense that every 524(g)
21 case that's come before this Court has had similar kinds of
22 plan documents, if you will, all of which carry within them the
23 ability for the parties to amend it as appropriate. That is
24 very different from amending the plan. Those are the documents
25 that express various elements of obligations which are

1 incorporated into the plan, and we don't believe that there
2 should be any limitation other than what's set forth in the
3 documents about the ability to amend those.

4 THE COURT: Well, Mr. Cohn, I don't think that the
5 exhibits to the plan have to or even can follow the same
6 modification requirements as 11:27 for a number of reasons, not
7 the least of which is that the trust and the trust -- the TDP,
8 for example, will last for 50 to 70 years, and 1127 may not be
9 around that long to speak of, so -- and certainly,
10 unfortunately, but I won't, and so most of us in this room
11 probably won't. So I don't think that they can carry quite the
12 same parameters, but they certainly can require some form of
13 either notice or a hearing as appropriate in some
14 circumstances. I think that is a plan issue.

15 Some of the TDPs in some cases require some form of
16 notice if material changes are being made, some don't. It
17 depends on the circumstances and what it is that's being
18 changed. And so I think to the extent that some modification
19 is in order, that is really a plan issue, and each document
20 should be looked at.

21 If there's an objection to a specific type of
22 modification, I think you should raise it at the plan, and I'll
23 take a look at it. But I haven't seen all the documents yet,
24 so I don't even know what they all say. But I can't -- I just
25 don't think 1127 can be implemented with respect to each of

1 those exhibits. It just would not work.

2 MR. COHN: Your Honor, I'm actually apparently being
3 given credit for making a more subtle point that I was meaning
4 to make.

5 THE COURT: Okay.

6 MR. COHN: That I agree would be a plan confirmation
7 issue if the self-amendatory provisions of one of the exhibits
8 were challengeable. I'm just raising the point that to take
9 the TDP as an example, supposing you decide to drop Section 5
10 and insert a new Section 5, and that's then going to be the
11 plan that's being presented for confirmation, I just wanted to
12 make clear that there would need to be both adequate notice
13 from a due process standpoint and also a following of Section
14 1127 with respect to --

15 THE COURT: Oh, before confirmation?

16 MR. COHN: Yes, Your Honor.

17 THE COURT: Oh, for sure before confirmation --

18 MR. LOCKWOOD: Your Honor --

19 THE COURT: -- they've got to -- there will have to
20 be notice.

21 MR. LOCKWOOD: Your Honor, there will clearly be --
22 the TDP amendatory provisions don't become effective until the
23 TDP is effective, and that won't be until the effective date.
24 So up until the effective date any changes to the TDP or any
25 other plan document would be a change in the plan and would be

1 subject to 1127 --

2 THE COURT: Absolutely.

3 MR. LOCKWOOD: -- and there's no dispute about that.

4 THE COURT: Okay.

5 MR. LOCKWOOD: If it's material.

6 MR. FREEDMAN: The debtors concur in that.

7 THE COURT: Okay.

8 MR. FREEDMAN: Your Honor, that leaves us with a few
9 -- that leaves us with a few exhibits -- excuse me -- a few
10 objections that have been raised by the Libby claimants, and
11 Mr. Lockwood will address those, and then after that is
12 completed we'd like to address some objections that relate to
13 the solicitation procedures.

14 THE COURT: All right.

15 MR. LOCKWOOD: Your Honor, I'm going to address the
16 items that are shown on the chart as -- on Pages 11 and 12 as
17 Items 31, 33, 34, 35, and 36, which are all Libby claimant
18 objections, disclosure statement matters.

19 Item 31 is an objection that says that, "The
20 disclosure statement does not disclose the nature and amount of
21 the asbestos PI claims expected to seek or obtain designation
22 as extraordinary claims." The extraordinary claims are a
23 limited subset of claims that get individual review. They're
24 not resolved by the claimant under the expedited review matrix.
25 They go through individual review, and they are limited to

1 persons whose exposure is either 75 percent, in which it meant
2 they could get a five times multiple of the claim value, or 95
3 percent exposure to Grace products. Essentially people who --
4 who don't have much opportunity to go against other defendants
5 in the tort system.

6 To discuss this, I think a couple of points need to
7 be made by way of context. First, this is a level of detail of
8 projection which nobody's ever done in any asbestos bankruptcy
9 before. We've never broken down into the projections of future
10 claims into individual bite-size pieces of subsets of those
11 claims.

12 Secondly, this objection is coming from the Libby
13 claimants, who, through their counsel, have made it perfectly
14 clear that they understand enough about this plan already that
15 they intend to vote against it. So there is a certain
16 crocodile tear quality to their pleas that there's inadequate
17 disclosure for somebody who needs to decide how they're going
18 to vote with respect to this sort of objection.

19 Thirdly, it's also apparent, I believe, that what
20 this really is is an effort to try and get discovery of the TDP
21 underpinnings by way of a disclosure statement objection for
22 people who already intend to object to the plan not only vote
23 against it but object to it at confirmation. If you ask
24 yourself why would anybody need to know what the nature and
25 amount -- I mean they say expected to seek or obtain

1 designation as extraordinary claims. I mean what sort of --
2 what does that mean, expected by whom for what purpose? Why
3 would you even bother?

4 To the extent that I can figure out what the
5 rationale for asking of this level of detail would be, it has
6 to be, I believe, some notion that you're going to try and use
7 this information to either challenge the payment percentage,
8 because somehow or another you have -- you don't -- you haven't
9 accurately projected enough extraordinary claims coming from
10 Libby, or you've over projected the number of extraordinary
11 claims coming from somebody else, or you haven't projected the
12 extraordinary claims as a subset, and you need to do that in
13 order to arrive at the payment percentage or something. But in
14 terms of trying to figure out whether you should vote for or
15 against this plan, which is what these disclosure statement
16 objections are supposed to be all about, it simply does not
17 seem to be necessary, appropriate, or even reasonable to compel
18 people to go out and generate information that they don't have.
19 I will tell you right now I -- we don't know the answer to this
20 question, and to come up with it, I guess we'd have to go back
21 to claims -- the claims estimation experts in this case for the
22 ACC and the FCR and see to what extent they could break out
23 this subset and make an estimation. And then simply because
24 it's requested by the Libby claimants on some notion -- on some
25 generalized statement that we need it in order to know how to

1 vote, put it in the disclosure statement. And that just
2 doesn't seem to be a reasonable thing to ask anybody to do,
3 Your Honor.

4 THE COURT: Well, Mr. Lockwood, may I ask is it going
5 to be necessary to do it in order to make the initial payment
6 percentage determination?

7 MR. LOCKWOOD: No, Your Honor, certainly not in the
8 form in which it's requested. And, moreover, as you've heard
9 already, their -- one of their earlier objections was that we
10 didn't have the payment percentage in the plan.

11 THE COURT: Yes.

12 MR. LOCKWOOD: You had -- we've said we're going to
13 have to -- we're going to put something in, and it's going to
14 describe that. Well, part of the problem is that because of
15 the -- and this will show up with some of these other
16 disclosure statement objections. Because of the turmoil in the
17 markets and the fact that the plan consideration described in
18 the plan and the disclosure statement consists in a number of
19 instances of stock and notes and securities and stuff, the
20 payment percentage in the normal case is the value of the
21 assets in the numerator, the estimated total claims in the
22 denominator, and that's the payment percentage.

23 Here the numerator is, you know, I mean the value,
24 for example, of the warrants that the trust is getting, was
25 going from in the money by something like, I don't know, eight

1 or nine or ten dollars a share to out of the money by about
2 eight or nine or ten dollars a share in a month. And we're
3 getting Sealed Air stock, and there's a number of complexities
4 that we're wrestling with. How are we going to do this in a
5 manner that is sensible.

6 In that connection this number here, the
7 extraordinary claim number is -- would be a small piece of the
8 denominator, because effectively what you're saying is that
9 there would be -- you'd estimate the number of claims that
10 would take expedited review, and then you get individual
11 review, and some of the individual review claims would be
12 extraordinary claims, and how many of that, and what value
13 would they have in relationship to all the other value, and is
14 that an amount that would make a meaningful difference in the
15 dollar value of the denominator? I can't answer that, because
16 I'm not an estimator, but my -- the point I'm trying to make is
17 that there's no showing here, no intelligible articulation here
18 of why drilling down to that level of detail, if it were
19 possible -- and frankly, I'm not sure it is possible. But if
20 it were possible, why it would be a useful exercise. What
21 would -- how would it help anybody that's reading this
22 disclosure statement to decide whether they voted for or
23 against this plan?

24 THE COURT: Okay.

25 MR. LOCKWOOD: That takes me to Number 33, which is a

1 similar -- contains many of the same sorts of requests about
2 making predictions that involve sort of in various different
3 ways parsing the components of the payment percentage. The
4 first one is how many asbestos PI claims are projected. That's
5 just presumably a number. It doesn't tell you the value, so
6 without the values, it's a meaningless number.

7 But if you want to attack the denominator, then that
8 would be one of the pieces that you would want to have
9 information about that would enable you to start putting
10 together your attack, which is why I made this comment about
11 it's really a form of discovery to the claimants. Whether
12 there's a million claims or 500,000 claims or whatever, by
13 itself that information isn't going to tell them anything,
14 because it isn't going to tell them how many -- what the claims
15 are worth and what the -- and how much they're going to get
16 paid, all of which is a function -- everything in a sense backs
17 into the payment percentage, because that's what they care
18 about.

19 They're going to get a pile of assets, and they're
20 going to -- the trust is going to assume a pile of liabilities,
21 and at the end of the day the person looks in and they figure
22 out this is my claim, and this is the payment percentage I'm
23 going to get, and I'm either going to get the -- go for the
24 expedited value, or my lawyer will tell me you ought to go for
25 individual review. If you go for individual review, you don't

1 know how much you're going to get on your claim, because that's
2 by hypothesis individual review, much less if you go through
3 and go to a jury, but you'll at least know how much the payment
4 percentage is. And this is a global settlement. This -- what
5 we're talking about here ultimately is money that first goes
6 into the trust, that's the basic deal, and then it gets divided
7 up pursuant to the processes set forth in the TDP.

8 So how many asbestos claimants projected by itself is
9 not a meaningful number? What types are projected? Again, I
10 mean it's another subset of the number. How much the trust
11 expects to pay PI claims. Well, I mean you multiply the type
12 of claim by the payment percentage. That's already going to be
13 in there. If you want to go beyond that, and I'm not sure, you
14 know, whether you're talking cash flow or whatever, it's a
15 level of detail that there's no showing that anybody is simply
16 thinking about voting needs to know, but which somebody who
17 might be planning on objecting might find helpful.

18 When claims will be paid? I've already -- I'm
19 glossing over initial payment percentage, because I've already
20 said that you've got to come up with that.

21 Process to pay. Well, the TDP sets forth in gory
22 detail, you know, how you file your claim, what you get in
23 payment. You get in a processing queue. You get in a payment
24 queue. The liquidated claims get paid before the unliquidated.
25 I mean I -- beyond sort of referring one to the TDP, it's hard

1 to know what more would be warrant with that, but again the TDP
2 gives people and like the same TDP in eight or ten other
3 bankruptcy cases, most of which Your Honor has presided over,
4 nobody but the Libby claimants has ever announced that they
5 couldn't figure out what the process to pay was from reading
6 the TDP.

7 Which insurers are protected by the channeling
8 injunction and what consideration they are paying for the
9 injunction? Well, that Exhibit 5 has been added, and the --

10 THE COURT: Yes, that should take care of --

11 MR. LOCKWOOD: -- the issue of the consideration we
12 adverted to briefly, that's probably a confirmation objection.
13 If they take the position that the insurer -- a settled insurer
14 who settled pre-petition and has an indemnity right has to pay
15 more money to now to get 524(g), that'll be a confirmation
16 objection.

17 THE COURT: Well, and Exhibit 5 obviously might need
18 some changes to it. It's usually a work in progress until --

19 MR. LOCKWOOD: That's correct, and we've already
20 heard from some of the insurers that there are some mistakes,
21 and, certainly, the Libby claimants will be given updated
22 versions of that, so nobody's trying to hide any balls on that.
23 How many judgments are under -- outstanding and unpaid? Again,
24 that's just a part of the denominator fraction. This is the
25 liquidated judgments versus the unliquidated claims. How many

1 settlements are outstanding unpaid? Same comment.

2 Wrongful death claims. I don't know whether that's
3 liquidated, unliquidated, but it's clearly an effort to try and
4 get quantification evidence for support of the confirmation
5 objection that says they're being disallowed.

6 THE COURT: Well, let me just bypass this one. I --

7 MR. LOCKWOOD: Request for punitive damages. I
8 mean --

9 THE COURT: Let me just bypass this one. I'm going
10 to hear from Mr. Cohn, but on this one I don't believe that
11 this level of detail that's being requested is necessary for
12 the disclosure statement. I really don't think that most of
13 the people who would vote in this class would care about this
14 information. What they're going to want to know, I think, is
15 the initial payment percentage and how it will apply, if at
16 all, to their claim. They will want to know that.

17 MR. LOCKWOOD: And we --

18 THE COURT: And so that payment percentage --

19 MR. LOCKWOOD: We are not disputing that that's
20 something that has to be in there. The only reason it's not in
21 there is, as I said, we're having a little more difficulty
22 working it out than we would've normally expected to be having
23 absent this once in 80-year financial meltdown.

24 THE COURT: Okay, but whether -- you know, the
25 feasibility issues, whether or not this trust will, in fact,

1 have the funds to be able to pay that claim, and that, of
2 course, is a confirmation issue. But for disclosure statement
3 purposes, sufficient information for a claimant to assess
4 whether or not the funds will be available -- I'm talking
5 disclosure statement issues -- what that payment percentage
6 will be and the time frame within which it will be paid, and it
7 can be in the trust distribution procedures provided that the
8 claimants are getting those distribution procedures in a
9 fashion that they'll understand I think takes care of these
10 issues.

11 MR. LOCKWOOD: Well, I would -- in response to Your
12 Honor's last observation, I would just note one thing. That
13 the -- as we had in earlier discussion, one of the
14 characteristics of the TDP is that they have a provision to
15 permit their amendment. The reason for that has to do with the
16 requirement that there be a periodic review. This is in the
17 statute, the same subsection I read Your Honor earlier talks
18 about periodic review, and the reason for the periodic review
19 is, because the value of assets can go up. The value of assets
20 could go down. The number of claims and value of claims can go
21 up. The number and value of claims can go down.

22 As we saw, for example, with non-malignancy claims
23 during Your Honor's tenure in these cases after 2003, there was
24 a dramatic reduction in them, and forecasts have had to have
25 been adjusted for that. So on the one hand you can't say that

1 the payment percentage is going to be the same for the life of
2 the trust, although some of Mr. Cohn's objections seem to
3 suggest that he regards that it has, but that's just
4 inconsistent with the statute and not possible, then you would
5 have feasibility objections. But the flip side of that is,
6 because the trustees do do the periodic reviews, there will
7 never be an insolvency of the trust, because if, in fact, the
8 value of the assets go down and the -- and -- or the
9 liabilities go up, they'll reduce the payment percentage, so
10 that the people at the end of the line who'd be the ones that
11 would be affected by insolvencies would be protected. They
12 might get less. On the other hand, they might get more. Some
13 of the trusts have actually increased their payment
14 percentages.

15 THE COURT: All I'm saying is for disclosure
16 statement purposes, you just need to have enough information in
17 it that the claimant voting understands the basic concept.
18 That's all. I don't think the claimant voting is going to want
19 to -- especially to the extent that there's a master ballot
20 that's going to be submitted, the attorneys already understand
21 this process. They've been through it probably 15, 20, if not
22 more times. They don't need this information, and that's what
23 I'm looking at, the hypothetical person who's going to vote.

24 So this information is not necessary for the class
25 for which those entities are going to vote for which it's being

1 asked to be submitted. I don't think it's necessary in that
2 context. So it may be necessary for plan confirmation. It may
3 be a discovery issue, but it's not necessary for the disclosure
4 statement, but the payment percentage clearly is. We've
5 addressed that. Okay.

6 MR. LOCKWOOD: That takes us, Your Honor, to Number
7 34 on the chart, which is a two-part one, one of which it's
8 been resolved already, which is the missing Exhibit 5.

9 And then it says, "The disclosure statement fails to
10 accurately and completely describe asbestos insurance rights
11 especially those related to premises completed operations
12 coverage." This again ties to one of the earlier objections we
13 heard from the Libby claimants. The reason that they want some
14 valuation, if you will, of the premises coverage is, because
15 it's their position that they have a unique and special right
16 to go after it, and this is sort of discovery in aid of saying
17 that it's worth a lot of money, and, therefore, Judge, you --
18 we're being --

19 THE COURT: Aren't the rights being transferred to
20 the trust?

21 MR. LOCKWOOD: Yes, that's the answer.

22 THE COURT: Well, that is the answer.

23 MR. LOCKWOOD: And that's in the plan, and that's in
24 the disclosure statement, and --

25 THE COURT: Well, that's the answer.

1 MR. LOCKWOOD: Number 35. 35 is to some extent the
2 same thing as 33 that we just talked about. They want to know
3 more details regarding which claims are eligible for payment
4 under the PI trust while the TDP has all kinds of criteria
5 about eligibility, exposure requirements, disease requirements
6 in the medical -- in the matrix description. It goes on for
7 pages.

8 THE COURT: Well, I guess the question is can the
9 matrix be put into some, you know, chart summary form that
10 could --

11 MR. LOCKWOOD: The matrix -- there are, in fact,
12 charts and summaries in the TDP themselves. If you look at the
13 TDP, there's a chart showing the exposure requirements by
14 disease and disease level. There's a chart showing the values
15 -- expedited values. There's the third chart showing the
16 expedited average and maximum values.

17 THE COURT: Well, are the TDPs going out with the
18 disclosure --

19 MR. LOCKWOOD: Yes, they are an exhibit to the
20 disclosure statement in the form that --

21 THE COURT: Okay.

22 MR. LOCKWOOD: -- it has been presented to the Court.

23 THE COURT: Then it doesn't need -- then nothing
24 further needs to be done.

25 MR. LOCKWOOD: The second category is the value of

1 assets that will fund the trust. To the extent that that isn't
2 subject to a moving target problem that we've been discussing
3 earlier, the assets that are going to the trust are, in fact,
4 described in Section 1.2.8 of the disclosure statement. What I
5 gather is being sought here is, for example, there's a
6 description of the warrants. We're being asked to put a dollar
7 value on the description of the warrants, despite the fact that
8 that value is going up and down on a daily basis. There's,
9 among other -- there's Sealed Air stock that's going in which
10 describe the number of shares, for example, of the Sealed Air
11 stock. Again, that goes up and down on --

12 THE COURT: Well, what about putting something in
13 that says that the valuation is going to be determined or is
14 going -- evidence of the valuation is going to be provided to
15 the Court at the plan confirmation that there's so much
16 volatility in the market right now that that -- that any --
17 that it's changing on a day-to-day basis?

18 MR. LOCKWOOD: Well, we --

19 THE COURT: I --

20 MR. LOCKWOOD: It may well be, Your Honor -- I don't
21 want to jump the gun here, but it may well be in describing
22 what mechanism we come up with on the payment percentage that
23 we may have to make some description of that --

24 THE COURT: That's the thing. You do.

25 MR. LOCKWOOD: -- because the problems we're having

1 with them -- I mean these values -- again, this is the
2 numerator going back to the payment percentage, and that's the
3 only relevance of it to the -- Mr. Cohn's constituency. It was
4 an asbestos claimant. So we'll have to say something about
5 totality of the value of the numerator which includes these
6 fluctuating components and beyond that, getting into each piece
7 of it -- I mean, among other things, there's, for example, the
8 insurance that is uncollected and contested by -- potentially
9 by insurers. We've never tried to put a value on how much --
10 predict how much of it we're going to collect, because that
11 depends on the uncertainties associated with the hypothetical
12 efforts by the trustees that Mr. Freedman was talking about
13 earlier, how successful they're going to be.

14 And indeed one of the risk factors is going to be if
15 the insurers are right about the transfer and the -- their
16 coverage defenses and how the trust is going to buy -- the
17 answer would be zero, but that wouldn't be because the
18 insurance rights themselves were worth zero. It would be that
19 the defenses to the insurance rights transfer were good enough
20 that you couldn't collect on it. So there's --

21 THE COURT: But you can put in minimums and maximums.
22 You can say that if the insurance companies are right, nothing
23 is collected, zero, but the face value of the policies is
24 worth, you know, whatever --

25 MR. LOCKWOOD: Well --

1 THE COURT: -- \$50 million.

2 MR. LOCKWOOD: Well again I come back to the notion
3 let us work on that in terms of how we describe the payment
4 percentage resolution, and maybe we can come up with something
5 that would -- Your Honor would --

6 THE COURT: Yes, some value has to be put in. I mean
7 if it can't --

8 MR. LOCKWOOD: Well, clearly, the numerator has to be
9 valued --

10 THE COURT: Exactly.

11 MR. LOCKWOOD: -- in some way or another. The
12 question is whether we do it by a formula rather than by a
13 number. That's one of the issues that we're trying to wrestle
14 with.

15 THE COURT: Okay. Well, some number has to go in,
16 and at the confirmation hearing I'm going to want some evidence
17 of what that value is. So, you know, if you want to put a
18 number in for disclosure statement purposes and say that some
19 evidence of value is going to be given at confirmation, that's
20 fine, but some evidence has to be -- or something's got to be
21 put in.

22 MR. LOCKWOOD: Well, I'm -- we're really reluctant to
23 put in a number if we think that the fluctuations in that
24 number on a short-term basis are potentially large in
25 magnitude, because we don't want to have people voting saying,

1 well, we're going to get a 30 percent payment, and by the time
2 the effective date comes around we can only afford a 20 percent
3 payment --

4 THE COURT: I understand.

5 MR. LOCKWOOD: -- or something like that. I mean it
6 -- that's why the current situation is so unusual in that
7 regard.

8 THE COURT: Well, that's what I'm saying. If you
9 don't want to put in a number now and say that because of the,
10 you know, unusual market conditions that the evidence is going
11 to be presented at confirmation, but based on what you know
12 now, you expect the additional payment percentage to be X. I
13 think under these very unusual times that we're living in, that
14 would be sufficient, but at the confirmation hearing I want
15 some evidence, so --

16 MR. LOCKWOOD: Well, as I said, we'll -- we will
17 satisfy Your Honor one way or another on this point.

18 THE COURT: Okay, but for disclosure statement you've
19 got to have something in there. I mean there has to be
20 something.

21 MR. LOCKWOOD: We will have -- whatever we come up
22 with, and it'll be back here on November the 14th --

23 THE COURT: Right.

24 MR. LOCKWOOD: -- it's clearly not something that
25 we're going to get resolved today.

1 THE COURT: Okay.

2 MR. LOCKWOOD: The next one is the liquidated amount
3 of each claim to be paid. I mean, you know -- and we were
4 going to process 100,000 claims. How could you possibly know
5 what the liquidated amount of each claim with individual review
6 and -- I mean --

7 THE COURT: Well, I don't even know how at this point
8 you -- well, you may know each claim if the proof of claim bar
9 date will hold, but they haven't all been liquidated, so --

10 MR. LOCKWOOD: And most of -- the vast majority of
11 these claims have not been liquidated. The future claims
12 haven't been liquidated. I mean just --

13 THE COURT: So that's an impossibility. I don't see
14 how the debtor could provide that information.

15 MR. LOCKWOOD: Romanette four is payment percentage.
16 We've discussed that.

17 Five, protected -- projected sources and uses of
18 trust assets. That sounds like they want a cash flow
19 projection for some indefinite future period. I mean again
20 what -- people want to know what the payment percentage is
21 trying to get us --

22 THE COURT: I'm sorry. I've lost you. Which one are
23 you up to?

24 MR. LOCKWOOD: This is thirty -- I'm still on 35,
25 Your Honor. This is Romanette five.

1 THE COURT: Oh, I'm sorry. Okay.

2 MR. LOCKWOOD: It says projected sources and uses of
3 trust assets. That's a cash flow statement in accounting
4 parlance, and the trusts cash flow I mean the payment
5 percentage people care about. If you're trying to figure out
6 how you're going to implement the payment percentage through a
7 sources and uses analysis, essentially, again you're trying to
8 get discovery that would enable you to say, well, if you
9 compare the sources and uses, it doesn't jive with the payment
10 percentage --

11 THE COURT: Well --

12 MR. LOCKWOOD: -- or something.

13 THE COURT: Is the trust going to be filing annual
14 reports?

15 MR. LOCKWOOD: Yes, with this court.

16 THE COURT: Then it seems to me that the thing to say
17 is that with respect to sources and uses, the trust will be
18 filing annual reports. I mean --

19 MR. LOCKWOOD: I believe --

20 THE COURT: -- right now you don't even have assets
21 sources and uses.

22 MR. LOCKWOOD: If the disclosure statement doesn't
23 say that the trust will file, we can probably put in a sentence
24 to that effect, Your Honor.

25 Risk of trust insolvency I believe I addressed

1 earlier about -- in the discussion about adjusting the payment
2 percentage. There won't be any risk of trust insolvency. What
3 there will be is a risk of a reduction in the payment
4 percentage which is (indiscernible) that there may be a chance
5 of an increase in the payment percentage.

6 THE COURT: Well, what happens if it gets to the
7 point where the trust can't make any additional payments? I
8 mean is then it just --

9 MR. LOCKWOOD: It shouldn't ever get to that point --

10 THE COURT: I know.

11 MR. LOCKWOOD: -- because the trustees are required
12 annually, semi -- and that's -- if there's one responsibility
13 that is preeminent from the particulars in the prospective of
14 the Futures Representative, who is going to be monitoring the
15 trustees in this regard --

16 THE COURT: I know, but then you also do have
17 instances where trustees breach fiduciary duties, and I
18 understand that that is not the common thing, but it has been
19 known --

20 MR. LOCKWOOD: So I'm supposed to put in --

21 THE COURT: -- to happen.

22 MR. LOCKWOOD: -- something disclosing that the risk
23 of the trustee -- what is the risk of the trustee's breaching
24 their fiduciary? I don't know how I could quantify that, Your
25 Honor. I would suggest to the Court it's quite low, since

1 they'll be being supervised by the Court.

2 THE COURT: I think it's -- even when trustees are
3 supervised by the Court, they've been known to do things which
4 breach --

5 MR. LOCKWOOD: If you'll tell me how I should
6 describe it and quantify that risk, Your Honor, I'll endeavor
7 to try and do it, but I really suggest that this is -- this is
8 to some extent a debater's point by Mr. Cohn. I really --

9 THE COURT: Well, I think that the issue with respect
10 to the risk of the trust insolvency is as you stated it, that
11 the trust has an obligation -- a statutory obligation to review
12 its own payment percentages, its assets and its uses of those
13 assets, that it will file an annual report, and it will do its
14 very best not ever to be insolvent, since it has fiduciary
15 obligations and a responsibility to insure that it continues to
16 be funded for the length of the time that it's going to be in
17 existence, and so it's a very low risk.

18 MR. BERNICK: And, Your Honor, I think it's actually
19 inherent to 524(g) that there's uncertainty. One is that this
20 -- the way that this plan is being set up tries to constrain
21 that uncertainty but is not unique. There's no exogenous --
22 there's no endogenous risk factor with respect to this plan
23 that's different from others.

24 THE COURT: No, there isn't. It -- Mr. Bernick, I
25 think it's really just an effort to put something in that

1 resolves an objection. I don't think it's something that's
2 going to affect anything much more one way or the other
3 frankly. But to the extent that somebody thinks there is some
4 risk -- you know, if it were not for breaches of fiduciary duty
5 recently, I wouldn't even give it another thought. But they're
6 there, so I think, you know, a sentence that indicates that
7 there is very little risk of trust insolvency because of the
8 overarching responsibilities of the trustees, the trust
9 advisors, the filing of the annual reports, the supervision of
10 the Court, and so forth, then I think you just put a sentence
11 in. You have to add a sentence anyway.

12 MR. LOCKWOOD: Yes, I'm turning toward the debtor,
13 because they control the pen, Your Honor.

14 THE COURT: All right. A couple of sentences. All
15 right. Next.

16 MR. LOCKWOOD: The final one I believe, Your Honor,
17 is Number 36, which says that, "The disclosure statement
18 provides no explanation for how the asbestos PI trust claims
19 will be liquidated by the asbestos PI trust." All I could tell
20 you is that Exhibit 4 to the plan -- to the disclosure
21 statement is the trust distribution procedures, and there's
22 some -- I count them -- 57 pages about how the trust is going
23 to liquidate asbestos PI claims. And if people want to know,
24 and as you pointed out earlier, most of these are plaintiffs'
25 lawyers, and they've seen this before, and they can read it

1 again, and I really can't imagine what more we need on that
2 subject.

3 THE COURT: All right. I don't know whether this is
4 just a technical issue that they're not, in fact, being
5 liquidated. They're simply being I'll use the word resolved.

6 MR. LOCKWOOD: Resolved. Well, that's the word we
7 usually use, Your Honor. I mean technically I suppose you
8 could say they're being liquidated, because that's not a
9 bankruptcy term. What they're not being done is allowed.

10 THE COURT: That's fine.

11 MR. LOCKWOOD: But --

12 THE COURT: Whatever they are, they're being --

13 MR. LOCKWOOD: But they're being --

14 THE COURT: -- resolved.

15 MR. LOCKWOOD: They're being resolved by the trust,
16 and how they're being resolved is set out in the TDP.

17 THE COURT: Yes, and I don't know what more you can
18 do. That's the whole purpose of 524.

19 MR. LOCKWOOD: And that's the whole purpose for
20 sending the exhibit along to allow people to figure out for
21 themselves if they want to go into that level of detail to know
22 exactly how the trust is going to go about liquidating or
23 resolving their claims. And it describes the matrix and the
24 individual review and the arbitration and the mediation and the
25 exit to the tort system, if you want, and the caps that Mr.

1 Cohn was complaining -- it's all in there.

2 THE COURT: Okay.

3 MR. LOCKWOOD: Thank you, Your Honor.

4 THE COURT: Mr. Cohn, I think there was one back here
5 that I --

6 (Pause)

7 THE COURT: I think I made -- tried to make rulings,
8 Mr. Cohn. I did take a look at all of the papers. I want to
9 -- I want you to understand as I was going through these I
10 really think this disclosure statement has information in it
11 that satisfies these things to the extent that most of the
12 information is incorporated in the TDP that will be attached.
13 I know I have overruled some things. I've asked for some
14 things to go in, so let me hear what else you have to say based
15 on what I've done already.

16 MR. COHN: Well, yes, Your Honor, since you ruled on
17 all the objections, I think what I'll do is I'll confine myself
18 observations rather than -- you know, rather than argument.
19 Obviously, our papers say it as articulately as we could why it
20 is we felt the additional information was necessary. So let me
21 just make two observations.

22 One is that first point about extraordinary claims.
23 Mr. Lockwood went to great length to explain why it is that one
24 couldn't, shouldn't, needn't, et cetera, say anything about
25 extraordinary claims. One of the key points of discussion in

1 these extensive discussions you've heard so much about between
2 the Libby claimants and the Asbestos PI Committee -- one of the
3 key points was extraordinary claims, because the Libby
4 claimants are people who are exposed to, you know, 95 percent
5 or more of Grace's asbestos. I mean if you're going to design
6 an extraordinary claims provision, you certainly ought to
7 design it with Libby claimants in mind.

8 And I just think it is telling that presented with an
9 opportunity to stand here at this podium and say, Your Honor,
10 the Libby claims are extraordinary claims, we think that
11 they're going to be -- this is how they're going to be handled,
12 they're going to be allowed on that basis, or excuse me,
13 liquidated or resolved on that basis, to have them say on the
14 record that which he asked us to rely upon in the context of
15 these negotiations would've been comforting, and it's very
16 telling that that was not a statement that he chose to make.

17 The second observation, Your Honor, I'd like to make
18 is that we've been criticized in the context of these
19 disclosure requests for seeking discovery. We're well aware
20 that there's going to be the need for discovery on these issues
21 and on many more in conjunction with the confirmation hearing,
22 and we will, of course, proceed on that basis. We do
23 understand the distinction. We do feel that people -- that it
24 would've been helpful to have on the record -- helpful for all
25 purposes, not just for the Libby claimants but for others as

1 well, to have had more information, but, you know, you've made
2 the rulings that you've made, and we will obtain the
3 information anyway for our own, you know, purpose of contesting
4 confirmation. So that's really all I have to say, Your Honor.

5 THE COURT: Okay. Mr. Cohn, just on this
6 extraordinary claims issue, I think just because the Libby
7 claims may be in the 95 percent exposure category does not
8 necessarily mean that they're all going to want to go into the
9 extraordinary claims review, and I think that's the problem
10 that the plan proponents have, plus they may not be the only
11 entities that will be in the 95 percent exposure category. The
12 debtor really doesn't know or the trust doesn't really know
13 who's going to fall in or make that claim, whether legitimate
14 or not legitimate. That's the difficulty that they face at
15 this stage of the proceeding.

16 MR. COHN: Well, they have -- obviously, the members
17 of the -- the Committee majority, Your Honor, controls a very
18 high percentage of the claims in this case. They certainly
19 know, based on their own claims, whether they have claims that
20 would qualify. They also have vast experience in the other
21 cases in which the same group of lawyers has basically
22 developed the same way of dealing with the claims. And so we
23 think there's more information that could be developed on this
24 that would be genuinely useful for everyone but will develop in
25 the context of discovery, Your Honor.

1 THE COURT: All right.

2 MR. LOCKWOOD: Your Honor, taking Mr. Cohn at face
3 value, (a) I thought I had said that the Libby claims would
4 most likely be the ones that would qualify for extraordinary
5 treatment as we understand them from Mr. Cohn and the Committee
6 member he represents. But Mr. Cohn and his Committee member
7 know vastly more about the Libby claims and whether they had
8 other exposures that would take them out of the 95 percent
9 category or the 75 percent category than we do, so how can they
10 possibly be asking somebody that knows less about those claims
11 to tell them what they know more about than we do?

12 I mean if it needs to be said, the reason -- the
13 reason we have an eight times category and a 95 percent
14 requirement is, because that's something that's unique to the
15 Libby claims. All the other extraordinary claims procedure,
16 which he dismissively talks about the members of the Committee
17 and controlling all the other cases are the five times level
18 with 75 percent, and they relate to situations which we've
19 never been confronted with anybody who had a lot of
20 occupational and non-occupational claims from a single
21 defendant before. So for him to say that we're just blowing
22 off in effect the Libby claims here is inaccurate and unfair.

23 THE COURT: Okay.

24 MR. BERNICK: I'm hearing this discussion evolve a
25 little bit, and I know from having conferred with the ACC and

1 the FCR for the personal injury claims that an awful work -- a
2 lot of work has been done by them, and that they're going to be
3 -- they assure me, and I'm thus far convinced, very able to
4 respond to all the matters that are implicated by the
5 confirmation hearing.

6 But the more that I hear, I just hear the list of all
7 the different requests that are being made. It seems as if in
8 some fashion the Libby claimants anticipate that there's going
9 to be the necessity of having almost a full-blown estimation
10 proceeding in connection with the Libby claims. You hear the
11 questions. It sounds like, well, tell us how many there are
12 going to be and what the cash flow requirements, et cetera, et
13 cetera, are going to be.

14 I certainly never thought that in connection with the
15 issue of a TDP we're going to get into the need for that level
16 of granularity, and I certainly don't know where it's required
17 as a matter of law. But one thing is for very definitely sure,
18 which is the -- if the Libby people really intend to place
19 these matters at issue, and with that degree of granularity,
20 they're saying they know that now, the discovery is going to be
21 principally from them. And in light of that, we ought to be
22 seeing the beginning of the information that they have.

23 It's been extraordinarily difficult to get
24 information about the Libby claimants for a whole variety of
25 reasons, and they're now here. They're now before the Court.

1 I think that really in a sense it's incumbent upon Mr. Cohn's
2 clients to answer the very same questions that were propounded
3 to the ACC and the FCR, and it shouldn't hold up the
4 confirmation process in this case. We shouldn't have to go
5 extensively litigate that. They should let us know what's
6 already there. It's already in there files. So -- I know
7 that's probably for another day, but I think it's going to come
8 up fairly shortly, because it's something that bears upon the
9 schedule for confirmation.

10 THE COURT: Well, if you want to get a discovery
11 order together, so that we get started on it, you know, let's
12 do a discovery order. But let's finish today's agenda first.

13 (Laughter)

14 MR. FREEDMAN: Your Honor, I started out --

15 MR. BERNICK: We'll wait til tomorrow.

16 MR. FREEDMAN: I'm about to get yelled at another
17 time. I started out today saying it was a happy day, and it's
18 now 3:35, and I think we're down to probably just one issue
19 that would have any substance of discussion in connection with
20 the solicitation procedures.

21 (Pause)

22 MR. FREEDMAN: We have now gone through the
23 disclosure statement objections, and in one fashion or another
24 addressed all of them, I believe. And we have our
25 instructions, and we've indicated to the Court what we're going

1 to do next. So it seems to us that we should turn to the
2 objections to the solicitation procedures motion. There are
3 only five of them which have not been completely addressed, and
4 most of these, as you'll see, have actually been talked about
5 at some length during the hearing, and only one of them might
6 require some discussion in my estimation.

7 The first one which was raised by the Creditors'
8 Committee at 115 in Longacre at 118 has to do with a
9 solicitation of Class 9, and as the Court now understands,
10 we've agreed to a provisional solicitation for that. So we
11 will provide for those procedures, and the Court will see what
12 we've done on the 14th.

13 The second one, the U.S. Trustee in Section 116 has
14 said that the debtors ought to provide for procedures in the
15 solicitation context for creditors to come forward and get
16 provisional allowance of their claims under Rule 3018. We will
17 so provide and work with the U.S. Trustee in terms of the
18 language. But we'll provide for that kind of a procedure, so
19 that creditors know what they have to do in order to be
20 temporarily allowed for voting purposes.

21 The Court has already instructed us with respect to
22 the U.S. Trustee's objection Number 117 relating to the opt-in
23 provision, and that we understand will be deferred until the
24 14th, and we understand the Court's comments so far with
25 respect to that.

1 The next one was raised both by the Crown, which has
2 now withdrawn its objections, and by the State of Montana, and
3 that has to do with the provision in the solicitation
4 procedures that indirect claims which are not liquidated should
5 be valued at one dollar. That is a common practice in these
6 cases. We're talking about contingent claims that actually
7 under the Bankruptcy Code at this stage would be disallowed
8 pursuant to Section 502(e) I believe.

9 In any event, we're providing for them to have the
10 right to vote. I don't believe that when they think about it,
11 they will actually want to put a liquidated amount on to the
12 amount of their contingent future liability, so it seemed to us
13 that the one dollar procedure was more than appropriate. And,
14 as I said, that seems to be the practice in all of the cases
15 that we've canvassed when we were constructing these
16 procedures.

17 So we'd urge the Court to approve that particular
18 provision and overrule the objections filed with respect to
19 that. And maybe I could stop here and let Mr. Monaco, if he's
20 still in the courtroom, speak to that issue if he wants to.

21 THE COURT: Mr. Monaco.

22 MR. MONACO: For the record, Frank Monaco for the
23 State of Montana. Your Honor, our point was more of a
24 disclosure statement objection as opposed to the solicitation.
25 I think our point is that explanation should be put in the

1 disclosure statement. The debtor has a statement at Pages 24
2 and 25 of its omnibus response. I think if they will put --
3 agree to put that explanation in an appropriate place in the
4 disclosure statement, we're done. We're not the only ones with
5 a CI claim that's been valued at one dollar, and so there's
6 probably other parties in interest who would be interested in
7 how they arrived at that.

8 THE COURT: Oh, okay.

9 MR. FREEDMAN: Your Honor, that's fine. We will put
10 appropriate disclosure of that kind into the disclosure
11 statement. And then, lastly, we have the now withdrawn issues
12 with -- that the Crown raised about having the Canadian
13 representative vote their claim. That's 119. That's no longer
14 on the table. So, Your Honor, I believe, unless one of my
15 colleagues tells me that I've missed something, that we have
16 completely covered all of the objections that were filed to the
17 disclosure statement and the solicitation motion and got the
18 Court's thoughts and rulings and everything that we needed.

19 THE COURT: Okay, so the solicitation package you
20 still can't get done though until the 14th because of this
21 issue with the U.S. Trustee that's deferred until then?

22 MR. FREEDMAN: Your Honor, that's correct.

23 THE COURT: Correct. Okay.

24 MR. FREEDMAN: Plus we have to construct the
25 provisional vote --

1 THE COURT: Yes, for the Class 9.

2 MR. FREEDMAN: -- for Class 9, and we're also going
3 to want to perhaps put in a disclosure that may even go into
4 the solicitation on the USG procedures. It's not clear how
5 that's going to fit in.

6 THE COURT: Okay. Mr. Pasquale.

7 MR. PASQUALE: Thank you, Your Honor. Just a point
8 of process. I mean we understand -- at least my understanding
9 is we're going to see at some point between now and the 14th an
10 amended disclosure statement. There are -- I mean none of our
11 issues are resolved, as I stand here today, although I'm very
12 happy with the progress we've been making. I'm not sure what
13 happens next. Does the Court expect a supplemental objection
14 to the extent language is not agreeable? We're going to have
15 to have a process to address any remaining issues. I hope
16 there are none.

17 THE COURT: I think I do need just -- I don't think a
18 supplemental. I actually think I need a new round of
19 objections, if there are any, to the new disclosure statement,
20 because I think the ones that have been addressed today are
21 basically hopefully going to be moot, and we should just scrap
22 what's here and start over with a new document, I think.

23 MR. PASQUALE: So we'll just need to talk about the
24 schedule for that, Your Honor.

25 THE COURT: I think.

1 MR. BERNICK: Yes, Judge, and I -- I'm not the master
2 of this by any stretch of the imagination, but I think that the
3 key thing we're down to a series of provisions, and I think
4 that what we need to do is to think through a process that
5 maximizes the amount of time that we have among the various
6 constituencies to get closure on those provisions as opposed to
7 there being a deadline for the overall draft that is in a sense
8 too early. That is to say I would suspect that by the time
9 that Your Honor gets at the most useful, you will want to have
10 a complete document, but the thing that you're actually going
11 to look at is the side-by-side --

12 THE COURT: Yes.

13 MR. BERNICK: -- of competing provisions. And so in
14 a sense probably our work product ought to be geared towards
15 creating those side-by-sides, so that they then get submitted
16 to the Court in a timely fashion. The full document then will
17 be something that they'll want to have done by the 14th, but
18 I'd rather have us have more time to get the side-by-sides done
19 as opposed to turning around a whole document, and then people
20 having --

21 THE COURT: Well, what about the debtor submitting
22 its next draft? Well, I suppose what's going to happen is,
23 frankly, you're going to negotiate piecemeal with the various
24 constituents --

25 MR. BERNICK: Yes.

1 THE COURT: -- and get the -- get this thing together
2 in sections.

3 MR. BERNICK: That's right.

4 THE COURT: Then at a certain point you're going to
5 have to submit a draft to everyone, so that you can then get
6 comments, objections, whatever you want to call them, back, and
7 then hopefully do a real draft that you will then file with the
8 Court.

9 MR. BERNICK: Well, what I'm thinking -- and again
10 Mr. Freedman would -- will be the person who decides this for
11 our team. But that actually what might make sense is to in a
12 sense get the side-by-side competing language done. As soon as
13 it's done or we reached impasse, that's really what gets
14 circulated to whoever's on the circulation list, so that
15 they're not waiting to get the final redraft before they see
16 all the issues on a rolling basis --

17 THE COURT: Okay.

18 MR. BERNICK: -- and that way the final draft doesn't
19 really need to be -- everyone's going to want to review it, but
20 there should be no new news. That the issues, to the extent
21 that they're issues, what we might be able to do is to in a
22 sense work with that spreadsheet that we have, the chart that
23 you have is essentially a spreadsheet, to let people know on an
24 ongoing basis what's happening with respect to the dialogue
25 that's taking place. So that at any given point in time, if

1 people want to know what's happening with respect to other
2 objections or language changes, that to the extent, you know,
3 feasible day by day we can get different -- new versions of the
4 spreadsheet out, and everyone can take a look at them and see
5 where the dialogue stands, and that way we don't -- it just
6 makes much -- what I'm looking to do is to eliminate a lot of
7 the time that just takes place in communication, so that people
8 are in the loop as the dialogue unfolds between, of course, the
9 principal interlocutors, which are Mr. Lockwood and Mr. Cohn,
10 as an example, people know where that goes on an ongoing basis
11 as opposed to the end of the day.

12 THE COURT: Okay. I think that's -- I think that's
13 okay. What I'm a little worried about is that -- let's say
14 that any particular provision goes through four or five drafts,
15 I'm not sure how you're going to actually get -- let me start
16 this again. That wasn't very articulate.

17 I was hoping to be able to get a black-lined version
18 of what's currently here with a new -- with a final version.
19 I'm not sure if the process that you're envisioning let's you
20 do that, because you may go through 15 different changes for
21 one provision, and what started off as the beginning and what
22 ends up may not give you a black-lined version.

23 MR. BERNICK: Well, in terms of what gets submitted
24 to the Court, obviously, you have -- we'll have what we have
25 today. We'll have the final version, and we'll have the side-

1 by-sides. What I am suggesting though is that rather than have
2 to build in a lot of time on the back end --

3 THE COURT: Yes.

4 MR. BERNICK: -- so that people -- not Your Honor but
5 people within this room have the opportunity to see things for
6 the first time --

7 THE COURT: Right. I agree.

8 MR. BERNICK: -- that to the extent possible we'll
9 try to give, you know, snapshots, you know, maybe at some
10 interval using the spreadsheet just to show what's already been
11 agreed --

12 THE COURT: Sure it makes sense.

13 MR. BERNICK: -- or what's not been agreed.

14 THE COURT: Right.

15 MR. BERNICK: You know, that's the best that I could
16 think of.

17 THE COURT: Mr. Pasquale.

18 MR. PASQUALE: Thank you, Your Honor. I just have
19 just the one caveat. The chart was an excellent attempt to get
20 everything together. It's not 100 percent complete. I know as
21 to our points, I don't know about others in the room, it was --
22 I don't mean to be critical of it, but to use that as the basis
23 is fine, but we need to recognize there are -- there are going
24 to be some pieces not now in there.

25 THE COURT: Well, that --

1 MR. BERNICK: We will endeavor to upgrade to meet the
2 necessary standards, and I mean that. That's not being
3 critical. It was done at -- on an ongoing basis, but using
4 that organization, I think that we now got the organization
5 largely in place. It'll be better.

6 THE COURT: Well, if you think something's missing,
7 you could send an email to the debtor and say --

8 MR. PASQUALE: Already have, Your Honor.

9 THE COURT: Okay. You know, so the thing can be
10 updated, too.

11 MR. J. COHN: I want to speak very briefly. You've
12 heard nothing from me today, and I want to make it as likely as
13 possible that this will be the standard here. But my client at
14 least is committed to as much as possible getting out of
15 peoples' way, and we have a pretty good dynamic, at least with
16 other debtors, with the ACCs, and the FCRs. You saw very
17 useful stipulations in Kaiser and in Federal Mogul, and we'd
18 like to eliminate and, you know -- and push off to coverage
19 litigation as many issues as we can and recognize the ones we
20 can't and maybe have some fights over the ones we can't.

21 But I just want to emphasize that we have been
22 getting information very slowly and very late in this process,
23 and it makes it more difficult for me to sit down and say
24 nothing if we're at the end of the line. And I just want to
25 encourage everybody please get us the information we need

1 quickly, so that we can have these discussions and arrive
2 hopefully at a consensual stipulation as to as many things as
3 we can.

4 THE COURT: Well, I think everybody needs it pretty
5 promptly since you only have two weeks.

6 MR. J. COHN: Right.

7 THE COURT: So maybe everything needs to be
8 circulated to everybody at this point. I don't know.

9 MR. BERNICK: That's what we're -- that's what the --
10 my idea with the spreadsheet was designed to try to accomplish.

11 THE COURT: Okay. Well, let me work backwards from
12 dates.

13 (Pause)

14 MR. FREEDMAN: Your Honor, just to make a factual
15 observation, we have only three hours on the 14th. We want to
16 proceed on that date, obviously. We also have the 25th open.

17 THE COURT: No, actually, you don't. My staff
18 thought you did, but you don't --

19 MR. FREEDMAN: Oh.

20 THE COURT: -- have that day. That's what I was just
21 looking to see if there was something else, but let me work
22 from the 25th for a moment. I'm sorry, from the 14th for a
23 moment. I don't know why it's listed as only three hours on
24 the 14th. I'm trying to double check this. I'm not seeing any
25 reason why it's only listed as three hours.

1 MS. BAER: Your Honor, when I originally received the
2 date, there was something on your afternoon calendar. Now that
3 could have changed, because I was given 9 to noon with the
4 thought that there was something else in the afternoon.

5 THE COURT: Okay. Let me just double check. I'm not
6 seeing anything. I think the whole 14th is open. Does that
7 solve the problem if the whole day is open on the 14th?

8 MR. BERNICK: I think it -- I really think that it
9 should. I think that most of the things we're talking about
10 now, we have a substantive matter that involves the third party
11 release. Maybe that can be resolved with language, but that
12 may be a substantive matter. But then I think most of the rest
13 of the things really are language issues. I should hope we can
14 finish them today.

15 THE COURT: Well, the other thing is I think I
16 have --

17 MR. BERNICK: The omnibus day. Is there any time on
18 the omnibus day?

19 THE COURT: Well, I think I have part of the day
20 before. I have something -- some little Chapter 13, it looks
21 like, in the afternoon, but, frankly, I don't even know what
22 this is, so I'm not sure if it's an accident that it's on my
23 calendar or something that got specially set that I just don't
24 know about.

25 (The Court speaks with the Clerk at this time.)

1 THE COURT: All right, so I may have about three
2 hours, but I do have a conference call that I have to be
3 involved in at 5:00 that day. So I'd have three hours --

4 MR. BERNICK: Okay.

5 THE COURT: -- in the afternoon that day and the
6 whole next day, if that would help.

7 MR. BERNICK: I think that that ought to -- that
8 definitely should be able to do it in part, because if we start
9 then, we can -- at least the lawyers can have the time in the
10 evening while they're sipping their martinis to resolve further
11 language problems.

12 THE COURT: That's the trouble with being a judge and
13 not being a lawyer anymore.

14 MR. BERNICK: Mr. Cohn likes martinis. Doesn't he?
15 We already know Mr. Speights does.

16 THE COURT: All right, so do you want to do that --

17 MR. BERNICK: Yes, I think that that's --

18 THE COURT: -- November 13th?

19 MR. BERNICK: Yes.

20 THE COURT: We can start on the 13th?

21 MR. BERNICK: Yes.

22 THE COURT: Okay. That's going to shorten the time a
23 little bit though.

24 MR. BERNICK: Right, so --

25 THE COURT: All right.

1 MR. BERNICK: -- working back from that --

2 THE COURT: Okay. Working back from that, I need the
3 documents by Monday the 10th, because I'm not going to have
4 access to the computer on the 11th. I have a Chapter 13 day on
5 the 12th, which means I'll have absolutely no time to read
6 anything on the 12th. So I need anything you're going to
7 submit at the latest by the 10th. I'd prefer them the Friday
8 before, but I know that's pretty much impossible. So if you
9 can get them to me Monday the 10th.

10 MR. PASQUALE: Objections, Your Honor, is that what
11 we're discussing?

12 THE COURT: Everything.

13 MR. PASQUALE: Everything.

14 THE COURT: I need the --

15 MR. PASQUALE: Okay.

16 THE COURT: -- the chart. I need Mr. Bernick's
17 office to file the side-by-side chart, the completed disclosure
18 statement, the objections, everything filed with me by the
19 10th. So that means whatever you're circulating among
20 yourselves, so that I can get a complete package filed by the
21 10th, has to be finished in time for him to do it.

22 MR. BERNICK: Well, the -- in order to alleviate the
23 -- what I suppose would be the consequent burden on everybody,
24 if we're working with competing language, Your Honor already
25 has got the objections that have been lodged. Maybe there are

1 new objections that will be lodged, but I think that -- and I
2 guess this is an open question both to the Court and to the
3 parties about really what makes sense in the way of work
4 product be delivered to the Court is, in fact, to have, you
5 know, this little spreadsheet where you have the number, you
6 have the party that's objecting. We already have what the
7 objections are. They can be corrected if people want to send
8 in corrections or whatever. You then have the competing
9 language, and that way you don't have to wrestle with the whole
10 new round of briefs on the subject. I think we --

11 THE COURT: I don't need -- I don't -- I really don't
12 need new briefs. I really at this point in time need --

13 MR. BERNICK: Language.

14 THE COURT: -- language.

15 MR. BERNICK: Okay.

16 THE COURT: In fact, I don't even really want more
17 briefs, but I would like new language.

18 MR. BERNICK: Now, of course, with respect to
19 property damage, because the personal injury FCR has now been
20 appointed, we, in fact, have -- I know that the property damage
21 FCR has just been appointed. We, in fact, know that Judge
22 Sanders is already at work coming up to speed and having
23 meetings, but our hope and expectation is to be able to play
24 the property damage side of the equation in at the same time.
25 That's probably more than any other single item what will be up

1 for discussion at least on the 14th, because that will be the
2 first opportunity that the property damage people will have had
3 to stand up and talk about their objections.

4 Now, without getting into a lot of the detail on
5 that, there are additional documents that are still being done
6 for property damage, because we now have a new Futures
7 Representative for PD, and so that is a more substantive area
8 of continuing work because of that new development. But our
9 goal -- and I know that Judge Sanders is trying to meet the
10 needs of a very accelerated process and still do his job.
11 Judge Sanders knows that there's a need to proceed promptly and
12 is working along to accomplish it. But I think in fairness to
13 the Court and all the other parties, that will be a significant
14 piece of our time on the 13th and 14th.

15 MR. PASQUALE: Just asking, Your Honor, the 13th and
16 14th is here in Pittsburgh?

17 THE COURT: Yes, I'm here.

18 MR. PASQUALE: Thank you.

19 THE COURT: All right. Anybody not able to make it
20 on the 13th and 14th, since this change in schedule? Is this
21 all right with everyone?

22 (No verbal response)

23 THE COURT: Okay, 13th from 2 to 5 --

24 MR. COHN: The 13th I have another disclosure
25 statement hearing. I'm going to try to move it, so that's why

1 you haven't heard from me today, but I guess there's a small
2 chance that the Judge might get mad and tell me no, but I will
3 definitely be here on the 14th no matter what.

4 THE COURT: Who's the other judge?

5 MR. COHN: Judge Rosenthal.

6 THE COURT: Oh, I'll just call him. I'll beg and
7 plead.

8 MR. COHN: If you would, that might help.

9 THE COURT: What's the case? Is it a big case?

10 MR. COHN: No. No. No, not so much, and I don't
11 think it'll be a problem, but I'll let your chambers know if it
12 is.

13 THE COURT: All right.

14 MR. LOCKWOOD: Your Honor, I have a problem, too, on
15 the 13th. I didn't have my Trio on, so I couldn't tell, but
16 fortunately, one of my colleagues -- I have a hearing in Newark
17 the morning of the 13th. If they could do the PD stuff the
18 afternoon of the 13th and then maybe we could do the rest on
19 the 14th?

20 THE COURT: Oh, sure, would that work for you, too,
21 Mr. Cohn?

22 MR. COHN: That would be terrific.

23 THE COURT: Okay. Well, that's fine with me. Does
24 that work for everyone else? And then, Mr. Cohn, that's all
25 right with you, too?

1 MR. COHN: Yes. Yes, that would be great. Thank
2 you, Your Honor.

3 THE COURT: All right, so we'll do the property
4 damage on the 13th, and then start and continue with the
5 disclosure statement on the 14th. Mr. Speights, do you have a
6 problem on the 14th?

7 MR. SPEIGHTS: I have no problem on the 13th or on
8 the 14th, Your Honor.

9 THE COURT: Okay.

10 MR. SPEIGHTS: Although I don't know that I need to
11 be there. I did have a matter if you're finished with the
12 scheduling issues.

13 THE COURT: Let me make --

14 MR. SPEIGHTS: Day of travel --

15 THE COURT: Let me make sure I am. Am I finished
16 with the scheduling issues?

17 MR. FREEDMAN: Yes, Your Honor.

18 THE COURT: Mr. Freedman.

19 UNIDENTIFIED ATTORNEY: We've got one more.

20 MR. RICH: One more, Your Honor.

21 THE COURT: All right.

22 MR. RICH: Alan Rich for the -- Judge Sanders. I'm
23 currently set for a hearing in Dallas in Federal Court on
24 Thursday, the 13th. Is it Thursday, the 13th?

25 THE COURT: Yes.

1 MR. RICH: Yes, Thursday the 13th in the morning. I
2 will endeavor to reset that hearing with the Federal Magistrate
3 Judge, but I may need a phone call.

4 THE COURT: Okay.

5 MR. RICH: -- if necessary. I'll --

6 THE COURT: That's fine.

7 MR. RICH: -- try to get it moved myself tomorrow,
8 but --

9 THE COURT: All right.

10 MR. RICH: Thank you.

11 THE COURT: I heard about this body attachment
12 process that they apparently use in New Jersey, Mr. Rich, which
13 I had not heard of, but I sort of like that term, so if I can
14 attach your body, then that's the process that I'll try to use
15 for the --

16 MR. RICH: That's the best offer I've had in a while.
17 Thank you.

18 THE COURT: Okay. If you need something, just let my
19 chambers know. All right, Mr. Speights.

20 MR. SPEIGHTS: May it please the Court, and I realize
21 it's two til four, and if the non-property damage people want
22 to get up and leave, I won't be insulted. This will probably
23 take about five minutes, but --

24 THE COURT: All right. Anybody who is -- oh, what's
25 the issue, Mr. Speights, so they know?

1 MR. SPEIGHTS: The issue is at the last hearing, as
2 you recall, in Wilmington I brought up the issue of the two
3 Anderson class claims.

4 THE COURT: Okay. If anybody is not interested in
5 Anderson class claims and wishes to leave, they're free to do.

6 (Pause)

7 THE COURT: Okay, Mr. Speights, thank you.

8 MR. SPEIGHTS: Thank you, Your Honor. You'll recall
9 on Monday I traveled to Wilmington, and I brought up the fact
10 that in the proposed plan and disclosure statement --

11 MR. BERNICK: Excuse me, Mr. Speights, if you could
12 just speak up a little bit? It's very hard to hear.

13 MR. SPEIGHTS: I pointed out in Wilmington that the
14 plan and disclosure statement listed three Anderson claims.
15 We, in fact, filed three Anderson claims, the claim for the
16 hospital, the statewide class claim, and the so-called
17 worldwide class claim, and all three are listed as active
18 claims in the documents before the Court. And I brought that
19 to the attention of the Court in response to Mr. Restivo's
20 status report and pointed out that previously he had not
21 mentioned the fact that there were three claims, and we went
22 round and round about it, during which Your Honor suggested
23 that it probably would've been best if as a part of your
24 certification and our certification you had expunged the two
25 class claims at that time. The certification order actually

1 says with prejudice, but it does not say those claims are
2 dismissed and expunged.

3 In any event, Grace was not prepared to deal with it
4 at that time, and you directed us to see if we could resolve
5 it, and if not, to bring it up at the disclosure statement
6 hearing, because, among other things, there's several issues
7 involved here. It goes to the question of voting and goes to
8 the status of those claims in case we want to file objections,
9 et cetera, et cetera. So I have returned this time to
10 Pittsburgh, albeit not a Tuesday, to see if we could resolve
11 the issue.

12 If Your Honor remains of the view that you should've
13 just dismissed those claims as a part of the certification
14 order -- and again the two claims I'm talking about are the two
15 class claims not the individual Anderson claims -- then I
16 suggest that the simplest way to do it, Your Honor, is for your
17 to sign a one-sentence order expunging and dismissing those
18 claims. I am not making a motion to have my own claims
19 expunged, but if that was Your Honor's intent or if that's the
20 practical effect of where we are, then I would suggest that
21 that is the simplest solution to carry out what Your Honor
22 intended to do. And, in fact, I have a proposed one-sentence
23 order which I'll pass up if Your Honor wants to do that.

24 In the alternative, if the claims are not expunged,
25 then they are active claims. The debtor filed objections to

1 the claims. It did not file motions for summary judgment, but
2 we need to move on with respect to those claims, and I suppose
3 have a hearing on the debtor's objections to those two claims.
4 The debtor has suggested on Saturday afternoon that it would
5 deal with the voting issue by saying that, well, the Anderson
6 Hospital claim would have any and all votes. I don't know more
7 than one vote. I think in 524(g) you vote by claimant, but I'm
8 not an authority on 524(g), but would afford no votes to the
9 class proof of claims, which again is evidence, in the debtors'
10 mind, apparently those claims ended with the Court's
11 certification order.

12 The bottom line is, Your Honor, I just want to
13 resolve the status of those two class claims, and if Your Honor
14 intended for them or believes they should be expunged, I would
15 request you enter that order. And if they are for trial, I
16 would like to set up a schedule and get them to trial.

17 THE COURT: Okay. I don't think, Mr. Speights, that
18 I really gave much thought to whether they were live claims or
19 not live claims. I think what Mr. Bernick was arguing at the
20 last hearing was that all you -- all the class proof of claim -
21 - all the certification motion did was certify whether or not
22 Anderson as a lead plaintiff could represent a class or not.
23 It doesn't represent a different proof of claim I think was his
24 argument.

25 So he said, as I recall -- I hope I'm not misstating

1 this -- that he would take a look at the issue as to whether or
2 not there was, in fact, a different proof of claim. But in his
3 view as he was arguing it, there was really only one claim.
4 The issue was simply whether or not Anderson would be certified
5 to represent a class, and then that class itself may hold some
6 different status.

7 But, in fact, the class wasn't certified either
8 statewide or on some broader basis. There was no
9 representational capacity for Anderson. So since it doesn't
10 represent anything in a representational capacity, those proofs
11 of claim are out there, but they don't have any effect, because
12 they're basically duplicative of Anderson's claim, and that's
13 my concern. I simply think the docket needs to get cleaned up,
14 because at this point it looks to me like Anderson's got three
15 proofs of claim filed, because it's got three proofs of claim.

16 It's asked for class representational status in two
17 of them which has currently been denied, and I think they're
18 duplicative claims at this point, because it's got three claims
19 out there as Anderson Memorial Hospital asking to be a class
20 representative in two of them and on its own behalf in one. I
21 think it -- for bankruptcy purposes it's really one claim, and
22 two of them probably should be made to go away, so that it's --
23 so that the docket's clear, but that's the only thing.

24 Then if I'm reversed on appeal, those proofs of claim
25 would have to be at some point reactivated, or Anderson's own

1 claim at that point would have to -- well, I'm not sure the
2 right word's bifurcated, but it would have to be treated in
3 some capacity both in its individual capacity and in some
4 representational capacity, would have to deal with that down
5 the road. But that's my only concern. It's a docket cleanup
6 issue, nothing more, from my point of view.

7 I wasn't trying to make work for anybody. I was
8 simply trying to take account of the fact that I think the
9 docket's got duplicative claims there.

10 MR. SPEIGHTS: Well, and the short answer to that,
11 Your Honor -- I have a long answer, but I hope I don't have to
12 get to the long answer. The short answer is the way you
13 normally deal with duplicative claims is you dismiss and
14 expunge claims, so that there's only one claim left. And if
15 that's what Your Honor's prepared to do, that's what my
16 proposed order would say. You expunge the two class claims,
17 and we have left the individual Anderson claims.

18 Of course, Your Honor knows we're trying to appeal
19 the class claims, and, hopefully, I'll be back one day alive
20 and well. But, in any event, that would clean up the docket.
21 And I don't know what the objection is. I can go into a lot
22 more history, but if that's what Your Honor's inclination is,
23 I'm happy to pass up a proposed order and go to South Carolina.

24 THE COURT: Okay. Ms. Baer, Mr. Bernick, I'm not --
25 Mr. Bernick.

1 MR. BERNICK: This is -- well, I won't make a
2 comment. I'll simply recite what I believe the facts of the
3 law are. With respect to the law, Rule 23 does not change
4 substantive or procedural bankruptcy law. It just doesn't. It
5 is -- it's something that's a device that can be deployed
6 within the context of bankruptcy, but it doesn't change rights.
7 It doesn't create claims. It doesn't create rights under
8 bankruptcy law. The same thing the other way around. It's a
9 bankruptcy procedure including the claims and objection process
10 doesn't modify Rule 23.

11 Mr. Speights seems to believe that because a proof of
12 claim has been filed that purports to be a class proof of
13 claim, that there comes into existence some thing called a
14 class claim that has a life that it would never have under Rule
15 23 and has a life that it would never have under bankruptcy
16 procedure such that even when class is denied, it still exists
17 and it can be tried as a class. And if class is denied, it
18 must undergo the further step of being expunged. I'm not aware
19 of any such beast under the rules. I don't think that there is
20 any case that has said anything like that, and I don't believe
21 that the Court should give it any kind of recognition.

22 So we then get to the question of whether because the
23 debtor has said it's an active claim, that that all of a sudden
24 -- that is the debtors' statement in its papers then creates
25 this hybrid beast that has some separate juridical existence,

1 and that is relatively easily handled. So I put those two
2 points together, and I say this. Anderson Memorial has a claim
3 as an individual claimant. That claim is an active claim.
4 It's not been dismissed or expunged.

5 There are two additional claims that to the extent of
6 Anderson individually are no different than the first claim,
7 and, therefore, they don't need to be adjudicated or pursued in
8 order for Anderson Memorial to have the ability to prosecute
9 their individual rights. The other portion of those two claims
10 is a -- what's effectively the incorporation of a motion or a
11 request that says that Anderson would also like to act as a
12 representative with respect to the class. That portion has
13 been denied, and until there's a final order with respect to
14 Anderson Memorial individually, there's always the right to
15 seek to take an appeal at some further stage.

16 So it seems to me that the appropriate way for the
17 Court to treat this is to say -- and the debtor will amend its
18 documents to so recite -- is that the Anderson Memorial
19 individual claim, whatever that docket number would be, would
20 be active. That the second two claims would be inactive and
21 held in suspense. To the extent that they are Anderson
22 Memorial individually, they are duplicative of the first one
23 and need not be pursued. To the extent that they're Anderson
24 Memorial seeking to act in a representative capacity, they're
25 held in suspense until a final disposition of the individual

1 Anderson claim.

2 Therefore, going forward there's no need to expunge.
3 There's no need to try a claim that doesn't exist or try a
4 status that doesn't exist and indeed has been denied. And
5 there's also no lack of clarity on the docket, whenever we talk
6 about an Anderson Memorial as an active claim, it will be the
7 individual Anderson Memorial case.

8 I think that what Mr. Speights is trying to do is to
9 create a dichotomy where there are three options not two. He'd
10 like to say that claims are either active or expunged, so that
11 if the Anderson Memorial claim is active, he can say it goes to
12 trial. If it's expunged, he can then say, well, it's now been
13 dismissed, and he now has the right to renew his request to
14 take an appeal based on the dismissal, and that's not
15 necessary. We can simply hold the other two claims in
16 suspense.

17 So we would ask that the Court not enter the order
18 that Mr. Speights is anxious to get signed. We will submit an
19 alternative order that simply recites that the second two
20 claims are inactive, and we will amend our documents to make
21 the -- to reflect the same status.

22 THE COURT: Okay. What are the proof of claim
23 numbers? I think I actually need to look at the proofs of
24 claim.

25 MR. SPEIGHTS: Your Honor, the proof of claim numbers

1 are 009911, that's the worldwide claim, and 009914, that's the
2 statewide claim.

3 THE COURT: And the individual?

4 MR. SPEIGHTS: I think it's 009911.

5 MR. BERNICK: We have it down as 11008.

6 MR. SPEIGHTS: Is it 8?

7 THE COURT: Wait. I'm sorry. Would you give me
8 that?

9 MR. SPEIGHTS: I'm sorry.

10 THE COURT: The individual one. I --

11 MR. SPEIGHTS: 009908?

12 MR. BERNICK: No, I -- we have it as 11008.

13 THE COURT: Okay. I don't have any of them, so I'm
14 probably going to need to get copies from the claims agent
15 anyway.

16 MR. SPEIGHTS: I have them. I have them right here,
17 Your Honor. I'm sorry. I was trying to read it off of the
18 proposed order.

19 MR. BERNICK: Actually, it would probably make --

20 MR. SPEIGHTS: This is the Exhibit 21 to the exhibit
21 of the unresolved claims according to Grace, and the worldwide
22 claim is 009911.

23 THE COURT: Okay.

24 MR. SPEIGHTS: The statewide claim is 009914.

25 THE COURT: All right.

1 MR. SPEIGHTS: And the individual claim is 011008.

2 THE COURT: 011008.

3 MR. SPEIGHTS: Yes, Your Honor. Now, if I could
4 respond to what Mr. Bernick said, I don't -- unless I was
5 interrupting, Your Honor. The worldwide class claim, which I
6 have in my hand, a very thick claim which has, of course,
7 Anderson as a worldwide class representative and I think about
8 3,000 job sites attached attempting to follow Judge
9 Gambardella's decision is a separate claim. The statewide
10 claim has different attachments filed specifically as a
11 statewide claim but different attachments of job sites in South
12 Carolina. And the individual claim, separate claim, separate
13 claim number, filed on behalf of the hospital with information
14 about the Anderson Memorial Hospital.

15 Grace files objections to each of those claims. They
16 filed those objections on September 1, 2005. Thereafter, we
17 file a motion for certification. Now, I don't understand, Your
18 Honor -- and maybe I'm missing something here. I don't
19 understand why we should do anything other than your immediate
20 reaction if as a result of your class certification order their
21 statewide and worldwide claims are nothing more than Anderson
22 and are duplicative and should be dismissed and expunged.
23 That's a normal straightforward way of dealing with the
24 bankruptcy docket as I understand it.

25 So then the question comes up what is Mr. Bernick's

1 problem, and maybe we all have been, you know, not quite candid
2 enough with the Court to say what's really going on here,
3 because among other things, and there are several reasons
4 involved, Mr. Bernick wants to take the position any way
5 possible to keep the expungement of these two claims, which
6 Your Honor would not certify and said at the last hearing, you
7 know, they in effect are duplicative now -- he wants to do
8 anything he can to prevent Your Honor from entering an order
9 expunging them, because he believes I believe that that would
10 give me a right to appeal your certification order not as a
11 matter of discretion with the District Court, because a matter
12 of right, because you've dismissed. And, Your Honor, you've
13 ruled, and I understand your ruling, and I respect your ruling,
14 but every lawyer in America, every judge in America, knows that
15 you've got a right to appeal. There's nothing bad about
16 appealing. That's what lawyers do. So why are we down here
17 arguing two months -- on two hearings about the status of these
18 claims? You ruled. You think you -- you said at the last
19 hearing you should've just expunged them at the time.

20 THE COURT: No. No, I did not say that. I -- what I
21 think I said at the time was that maybe the debtors should've
22 asked for that relief at the time. I don't think I was
23 attempting to infer that I should've on my own expunged the
24 claims, Mr. Speights. At least that's not what I was
25 attempting to get to. What I was attempting to get to was if

1 they're duplicative, I think something should be done to get
2 them off the record if, in fact, they're duplicative.

3 But I also have the problem that if they're not
4 duplicative, and maybe they're not, because they're asking for
5 different sets of relief if they've got different attachments
6 attached, then -- and I'm reversed on appeal, then we've got to
7 reinstate the claims. May I see them? Could I just take a
8 look at your --

9 MR. SPEIGHTS: Yes, Your Honor.

10 THE COURT: And I'll pass them back up to you.

11 MR. SPEIGHTS: I brought a copy. I've got a copy for
12 the debtor, although he has many copies.

13 MR. BERNICK: Okay. Well, I've looked at them.

14 MR. SPEIGHTS: Tab A is worldwide, Tab B is
15 statewide, and Tab C is the individual claim.

16 THE COURT: Okay. It's just been a while since I --

17 MR. BERNICK: Yes, it -- Your Honor, I'm sorry. Are
18 you looking at the proofs of claim?

19 THE COURT: Yes.

20 MR. BERNICK: Okay. I really -- my -- I don't need
21 them. I don't want to interrupt the Court, but I really think
22 that this has almost nothing to do with the proofs of claim
23 themselves, because there are simply pieces of paper that got
24 submitted by the bar date that were crafted by Mr. Speights.
25 The real question here does deal -- as Mr. Speights indicated

1 and as I indicated in my remarks, does deal with the right of
2 appeal. And the real question is whether in some fashion -- I
3 don't believe that the expungement of these claims is right to
4 a right of appeal, in any event, but what I do know is that Mr.
5 Speights has been very diligent in seeking to prosecute any and
6 all manner of appeals, and the real question is do we
7 facilitate yet another effort on his part to get appealed
8 before the Court -- the District Court and Court of Appeals
9 what's already been denied.

10 THE COURT: Okay. Well, I'm looking at the face of
11 the proof of claim just to see whether, in fact, they are
12 simply as filed duplicative, and they're not. The name of the
13 claimant is the same. It's filed as Anderson Memorial Hospital
14 on the individual claim. The statewide is filed as -- pardon
15 me a second -- Anderson Memorial Hospital, see attached. And
16 then the attached states various locations statewide in the
17 United States, commercial property, and then two boxes are
18 checked for when the property was built, before 1969 and then
19 1969 to 1973.

20 The individual indicates a specific address for the
21 building at 800 North Front Street in Anderson, South Carolina.
22 That it's a commercial building that was purchased between 1969
23 and 1973. And then the worldwide class indicates that the
24 claimant is Anderson Memorial Hospital, see attached, with
25 various locations worldwide listed as the address as a

1 commercial building with again two boxes checked, property
2 built before 1969 and 1969 to 1973.

3 So although I think what may be left still is a
4 duplicative claim in the sense that the only thing that can be
5 left at this point is a claim by Anderson, because I've struck
6 at this point -- or I shouldn't say struck -- I've not
7 certified at this point the request for class certification by
8 Anderson. The only thing that's left is the Anderson Memorial
9 claim.

10 But, nonetheless, if I am reversed on appeal at some
11 point, I think these two claims are different from the
12 individual claim, if, in fact, it's sent back to the Court. If
13 it's not sent back at some point, I think we have to do
14 something with these claims to get them off the docket, because
15 they're not going to be addressed in the debtors' bankruptcy
16 proceeding. But I think the debtors' plan information is
17 incorrect. That they are not at this point live claims,
18 because Anderson can have only one claim that states the same
19 address for Anderson's building. So --

20 MR. SPEIGHTS: But, Your Honor, if they are not live
21 claims, something had to happen to make them -- to kill them.
22 I guess that was the certification order. And then I would
23 ask, well, what is the status of the debtors' objections to
24 those claims? It filed individual objections to all three
25 claims. So are those objections overruled? Are they

1 dismissed? Have they gone?

2 THE COURT: Well, I thought the only objection that
3 was filed as to the two class claims was to the class
4 certification. If I'm incorrect, then I need to go back and
5 take a look at those objections to claims.

6 MR. SPEIGHTS: I believe you are incorrect, Your
7 Honor --

8 THE COURT: Okay.

9 MR. SPEIGHTS: -- because the objections were filed
10 before the motion to certify was filed, and we would all have
11 to go back and look at them, and I do think that -- that there
12 are some related issues to that, for example, authority to file
13 on behalf of others and that sort of thing. But those --
14 unless Mr. Bernick has a withdrawal in his pocket he's about to
15 hand me, those objections are sitting there, and that's why I
16 keep going back. If there's a claim and an objection, there
17 should be a resolution. One resolution would be to dismiss.
18 Another resolution would be to hear the objections.

19 THE COURT: Okay. Well, I thought that I addressed
20 everything, but maybe I haven't, Mr. Speights.

21 MR. BERNICK: Yes, there's a -- Mr. Speights is
22 encyclopedic in his recall of the proceedings here, and I say
23 this with complete respect, and he's raised a matter before the
24 Court. There's a legal side of this, and then there's a
25 factual side of this. I have spoken to the legal side of it,

1 which is that the second two proofs of claim purport to have
2 Anderson be a representative. That part of those claims is
3 purely a request. It's not actually -- there's no authority.
4 There's nothing that says that it is a class claim. It has to
5 be certified before it is a class claim, and those have not
6 been certified. And the certification aspects of those claims
7 are inactive and in suspense until there's a final order such
8 that if there is to be an appeal on final order of the class
9 certification motion, that that would then become timely.

10 The interim -- the idea of an interim appeal was
11 already exhausted. Rule 23(f) spells out specifically that
12 there's a right -- there's a -- not a right but the opportunity
13 to permit an appeal. That was explored by Anderson Memorial.
14 The motion for interlocutory review of the certification -- of
15 the denial certification was denied.

16 So under the rule -- Rule 23, which governs, there is
17 no right of appeal beyond the -- there is no opportunity for
18 appeal prior to final judgment beyond the one that was already
19 taken, and that was denied. And, Mr. Speights is correct, we
20 are anxious not to have yet another request made, which we
21 believe would be frivolous but would -- might still be made.
22 We're anxious to avoid another request being made, because he
23 believes it's appropriate as a matter of docket cleanliness to
24 have an expungement.

25 The rules are exhaustive. The one procedure that's

1 available has been used. It's been denied, denied, and,
2 therefore, with respect to the class component of those two
3 proofs of claim, they are inactive and should not be pursued
4 until there's a final order in Anderson.

5 Now, there's a factual side that Your Honor has now
6 brought out by reviewing and making reference to the second two
7 proofs of claim, which is that these two proofs of claim also
8 recited certain building locations, and that is correct. What
9 happened was that the -- those building locations were cited,
10 but there were also claims that were brought for those building
11 locations individually. And those were the ones that were then
12 the subject of the expungement orders that were entered in
13 connection with the process of winnowing away what it is that
14 Mr. Speights had the authority to pursue and what he didn't
15 have the authority to pursue.

16 So with respect to the balance, that is the non-class
17 portion of those claims, to the extent that those claims
18 purport to recite claims for other sites and locations, they
19 have been dealt with in the course of the individual claim
20 objection and expungement process as individual claims. Recall
21 in the case, for example, of the South Carolina class --

22 THE COURT: Gentlemen, push your button down, so we
23 don't hear you when you're speaking. Thank you.

24 MR. SPEIGHTS: I'm glad I didn't say something
25 unkind, Your Honor.

1 MR. BERNICK: Yes.

2 MR. SPEIGHTS: Apologize.

3 THE COURT: I just hear whispering, but I mean I
4 can't understand the words, but it still carries. Go ahead.

5 MR. BERNICK: Recall in connection with Anderson
6 Memorial, we actually got down to the point the South Carolina
7 class had only one member in it, and that was Anderson
8 Memorial. And what that really reflects is that the same
9 claims were then made the subject of individual claims, and
10 they were dealt with in the ordinary course. So I think -- and
11 I suppose we can reconcile now and double check, triple check,
12 to take a look at all those individual locations and see what
13 has happened to those individual locations as individual
14 locations and see if any of those individual locations are
15 duplicative of other individual claims that have already been
16 dealt with. And we can do the same thing with respect to
17 worldwide. I think the result will be the same.

18 But under no circumstances are the claims -- the
19 class portion of those class claims active. They're not
20 active, and they should be held in suspense. And we would say
21 that today even the individual locations that populate those
22 proofs of claim, that portion of those proofs of claim could be
23 held in suspense, because we need to check and see if there is
24 anything in there that actually remains to be taken care of.

25 If there are individual claims that fall within those

1 second two proofs of claim that have not been the subject of
2 some other order or disposition of the Court as individual
3 claims, we can identify them, and then presumably they're like
4 many other proofs of claim or individual claims that are out
5 there that are the subject of motion, not the subject of
6 motion. They remain out there, but under no case, under no set
7 of circumstances is there a class claim that is active or in
8 any fashion needs to be litigated, because that matter is now
9 at rest until there's a final order in connection with the
10 Anderson Memorial individual case.

11 Now, I haven't said a word so far today about whether
12 this matter is procedurally appropriate to be taken up today.
13 Mr. Speights made the request at the last omnibus to raise this
14 issue and to have us meet and confer. We have. We've been
15 very settled in our notion and haven't changed our view with
16 respect to the class status portion of those claims. We've
17 articulated that today. We will certainly amend our papers.

18 But if Mr. Speights wants to pursue now any
19 individual location that's the subject of one of those proofs
20 of claim, then we'll go back and take a look at that, and then
21 if he believes he needs some relief with respect to some of
22 these other addresses, or he wants to say for some reason those
23 need to be pursued as individual claims while everything else
24 is marching down the road to plan conformation, he ought to
25 then file a request with this Court if he wants to take some

1 step with respect to that.

2 We will have a dialogue with Mr. Speights to see are
3 there any individual addresses or claims that have fallen
4 between the cracks. But if he wants to do something to
5 litigate those matters, he ought to make an application to the
6 Court. We've responded to his request to meet and confer, and
7 we have apprised the Court of what our position is with respect
8 to that.

9 THE COURT: Okay. I'm sorry. I'm a day late and a
10 dollar short here. I never picked up on the fact that some of
11 these individual -- some of these buildings listed in these two
12 class proofs of claim may not have already been the subject of
13 individual claims filed.

14 MR. BERNICK: I believe that there are none. I
15 believe that they all were at one point the subject of an
16 individual claim file, and that's why we had all these
17 unauthorized claims that were then in some fashion withdrawn,
18 expunged, whatever. So I believe that the only portion of
19 those second two proofs of claim that is out there today is the
20 individual Anderson Memorial claim and the denied request for
21 class certification. I don't believe that the individual sites
22 have any separate existence in those proofs of claim. They've
23 all been handled elsewhere. But I don't know -- we have to go
24 back and make sure that that is so. It is very distinct in my
25 mind that with respect certainly to the South Carolina class

1 that was down --

2 THE COURT: To one.

3 MR. BERNICK: -- to one --

4 THE COURT: Right.

5 MR. BERNICK: -- which is Anderson Memorial 1,
6 Anderson Memorial 2, and Anderson 3. There's three different
7 proofs of claim, but the only individual claimant that was left
8 was Anderson Memorial. With respect to the worldwide, I think
9 it was the same thing, but I'd have to double check to make
10 sure. I just don't know the answer to that.

11 THE COURT: Okay.

12 MR. BERNICK: So but I mean we've got Anderson
13 Memorial. That's one. Then you've got Anderson Memorial plus
14 1, 2, 3, 4 in the class. Then you've got Anderson Memorial
15 plus 4, 5, 6, 7 -- 5, 6, 7 plus (indiscernible). I think that
16 in South Carolina these were all disposed of, that is the 1, 2,
17 3, 4. With respect to worldwide, I believe that these were all
18 disposed of. I'm not positive about them. But under any set
19 of circumstances -- under any set of circumstances the class
20 portion of those claims is dormant and doesn't need to be
21 pursued. It's inactive.

22 We'll double check to see whether there are any of
23 these listed addresses that were actually the subject of a live
24 claim or are a live claim and in some fashion need to be the
25 subject of some further proceeding. But they're not -- none of

1 that is class. Class is inactive, dormant until there's a
2 final judgment in Anderson Memorial.

3 THE COURT: All right, but I thought I just
4 understood Mr. Speights to say that there is still something
5 that I didn't adjudicate in the debtors' objection to claim
6 that was filed along with the objection to the class
7 certification.

8 MR. BERNICK: Yes, that -- because the debtor
9 objected to all of these proofs of claim.

10 THE COURT: Yes.

11 MR. BERNICK: Okay, and the objection -- when we
12 filed the objection, the -- that then made those claims to --
13 all those claims into contested matters, and thereby teed up
14 this omnibus procedure that we had. They then -- it was their
15 burden to move for class certification on the class portion,
16 which they did. That was denied, so the class portion is out.
17 It wasn't granted, and that can't be revisited, if at all,
18 until later on.

19 Because we though also objected in the omnibus
20 objections to each one of these proofs of claim but also the
21 individual proofs of claim, the question then on the table is
22 is there some aspect of these proofs of claim not as concerns
23 the class but as concerns these individual locations that are
24 included within the class that somehow hasn't been dealt with
25 in connection with those same locations filed as individual

1 claims.

2 THE COURT: Okay, but that was not still in -- I
3 didn't think that was in connection with the objection to the
4 class certification. I thought that was --

5 MR. BERNICK: No, it's totally different. That's --

6 THE COURT: Well, that's what I thought.

7 MR. BERNICK: Yes.

8 THE COURT: I'm confused. All right. That's what I
9 thought.

10 MR. BERNICK: Yes.

11 THE COURT: That it was a separate objection, and
12 that they had all been disposed of.

13 MR. BERNICK: I believe that that's correct. The
14 omnibus -- the omnibus objection process would've spoken to all
15 of that, and whatever came out of that is where we are on the
16 -- I mean there are -- there are some claims that have come
17 through the omnibus objection process that still remain. I'm
18 not sure if there are any that are Mr. Speights' claims other
19 than the Canadian claims that are sub judice. But again my
20 impression is the same as the Court's. All of the individual
21 claims went through the omnibus process. Mr. Restivo made all
22 those reports, and that should've included any one of these
23 individual locations that populates these claims, because we
24 think we're correct that there were individual proofs of claim
25 that were filed as well.

1 THE COURT: Okay.

2 MR. BERNICK: And it may be that this ultimately goes
3 back to the fact that Mr. Speights agreed to withdraw let's say
4 Claim 1 from the South Carolina class, and it was agreed -- it
5 was withdrawn under agreement. I don't know if he also
6 withdrew on the docket the part of the South Carolina claim
7 that was Location 1. And maybe what we have here is really an
8 artifact of the withdrawal process of these individual claims.
9 Don't know the answer to that. Do know that we should continue
10 the dialogue with Mr. Speights, but there's no reason -- and
11 certainly a lot of reasons not to enter any kind of expungement
12 order then as backup to determine whether there's some new
13 right of appeal.

14 THE COURT: Okay. Mr. Speights.

15 MR. BERNICK: And I'm sorry for the confusion, Your
16 Honor.

17 MR. SPEIGHTS: I actually understand the facts, Your
18 Honor, but this is to me incredibly simple. It involves one
19 word, suspense. I'm not familiar with that term in connection
20 with the claims. I know that with the 44 claims you dismissed,
21 you rejected ratification. You dismissed them. We're on
22 appeal. If I convince the Third Circuit Your Honor was
23 mistaken, we'll come back, and the claims will be reinstated.

24 I'm familiar with allowance, and I'm familiar with
25 expungement. I don't know what this suspense is. It's sort of

1 a -- apparently, it's a purgatory of bankruptcy, but I've never
2 been there before, and I really don't want to go there, and I
3 don't know that there's such a procedure to be there. For
4 example, if you put my two claims in purgatory, in suspense,
5 can they vote? Okay. There's been no determination of that.
6 If you put my two claims in purgatory, what happens to Grace's
7 objections to those claims? They've got other objections.
8 They've never resolved themselves. They didn't object on these
9 claims being duplicative. They objected on hazard and probably
10 product I.D. and all other stuff. We never got to that.

11 THE COURT: As to Anderson?

12 MR. SPEIGHTS: As to Anderson.

13 THE COURT: Okay.

14 MR. SPEIGHTS: As to Anderson, they filed separate
15 objections to each of these three claims, and I don't know --

16 THE COURT: Only as to the hospital.

17 MR. SPEIGHTS: No, all three.

18 THE COURT: No.

19 MR. SPEIGHTS: They filed objections to each one of
20 those three claim numbers, Your Honor.

21 THE COURT: Yes, but wait. That's what I'm trying to
22 get to. I think that as to each of the buildings, other than
23 the hospital itself, that there have been orders that have
24 adjudicated each of the buildings behind the worldwide class
25 and behind the state class, except the hospital building

1 itself. Am I in error?

2 MR. SPEIGHTS: You might not be in error, Your Honor.

3 THE COURT: Okay.

4 MR. SPEIGHTS: Although that would send us down a
5 long road to discuss the history of everything that's happened,
6 and I believe that you -- you said to me that you don't need to
7 do a class claim and individual claim, so I'm going to dismiss
8 the individual claims, and I believe without prejudice to the
9 class claim, and then you later ruled against me on the class
10 claims. But I believe you have probably dealt with -- I'm not
11 sure. Let me say I'm about 75 percent sure you've dealt with
12 the individual buildings of the statewide claim and of the --

13 THE COURT: Worldwide.

14 MR. SPEIGHTS: -- worldwide --

15 THE COURT: Right.

16 MR. SPEIGHTS: -- on the individual basis.

17 THE COURT: Right.

18 MR. SPEIGHTS: Which leads me -- well, then maybe --
19 as I said earlier, maybe that's a reason coupled with the class
20 certification issue to now expunge those claims.

21 THE COURT: Well, I don't know that they need to be
22 expunged. I think if that's the case, if -- I think both you
23 and the debtor need to check the worldwide class proof of claim
24 and the statewide class proof of claim. And if it is the case
25 that every building except the hospital itself has been dealt

1 with, the reality is that those two claims are moot. There is
2 nothing more to be adjudicated, because the Anderson claim is a
3 live claim at whatever the number is that you gave me, the 011
4 number. All of the other buildings have been adjudicated by
5 substantive orders that have been entered one way or another in
6 all of those claims. So there is nothing left to adjudicate in
7 either the statewide class or the other class. So they're
8 simply moot. There's nothing left to be done.

9 MR. SPEIGHTS: Your Honor, what is wrong -- I mean
10 let's assume all that's correct, and I believe there's a good
11 chance it is. We've got a -- the term moot. What is wrong
12 with an order saying they're dismissed?

13 MR. BERNICK: Because a class --

14 MR. SPEIGHTS: Because I mean I don't know what it
15 means they are moot. I mean normally you allow or you disallow
16 claims.

17 THE COURT: There's nothing there to allow or
18 disallow, because they've already been taken care of by
19 substantive orders except for Anderson, which is being
20 addressed in a different action. So there's nothing there for
21 me to adjudicate. I've already addressed them in other
22 proceedings.

23 MR. BERNICK: In --

24 MR. SPEIGHTS: Would Your Honor in that circumstance
25 then entertain a written order calling them moot or whatever

1 you want to call them, so that there is some record of the
2 status of those? I mean, Your Honor, we'd have to go to all
3 the transcripts and try to explain it to some Appellate Court,
4 you know, because it's a problem, because we -- Mr. Bernick and
5 I argue in other courtrooms besides this one, and lawyers are
6 like politicians in a way, they put their own spin on things.
7 So maybe we need a written order from the Court. I --

8 MR. BERNICK: Your Honor, if they want to make an
9 application for a written order, that's fine. We would be
10 prepared to submit something to the Court that recites the
11 facts as they are, and if the right word for the individual
12 constituents of these other two claims is moot, that's
13 appropriate. But the thing that's key is that the class
14 portion of -- to the extent that these purport state class
15 claims that that is not dismissed and it's not expunged,
16 because it's subject ultimately to the possibility of an appeal
17 upon final order in the Anderson Memorial case, and, therefore,
18 any order that Mr. Speights would want to get signed expunging
19 or dismissing is simply an effort to get a further
20 interlocutory review. That would be improper. So --

21 THE COURT: No, I think to the extent that these
22 claims are simply at this point redundant, because they've been
23 addressed elsewhere, I'm not going to create a new appeal time.
24 To the extent they're moot, they're moot, because there's
25 nothing before me to adjudicate, because they've already been

1 addressed in other orders. And probably what would make sense
2 is to tee up by proof of claim number -- let's say -- I'm just
3 going to make up an address. Let's say a building is located
4 at 100 State Street, and there has been an order that's
5 addressed the building at 100 State Street. It can say this
6 proof of claim -- you know, that address is 100 State Street
7 and the state proof of claim was addressed by order dated such
8 and such at docket number such and such. And then if you want
9 a record, Mr. Speights, it'll show you where the record is. If
10 that's the issue, tracking the record, you can track the
11 record.

12 MR. BERNICK: That's fine.

13 MR. SPEIGHTS: Mr. Bernick just said something that's
14 very educational. He said I don't want to create -- Your Honor
15 shouldn't create another avenue of appeal. The problem is,
16 Your Honor, that Mr Bernick takes the position that the
17 previous order was interlocutory, and we had no right to
18 appeal.

19 MR. BERNICK: No, that's not true.

20 MR. SPEIGHTS: And I take the position --

21 MR. BERNICK: I'm sorry, Your Honor. This is just --
22 again, we're now -- this is five minutes turning to 45. I know
23 you will listen to him --

24 THE COURT: It doesn't matter, gentlemen. I don't
25 have anything to say about whether they're appealable or not.

1 I entered the order I thought was proper. The District
2 Court's going to say whether it is or isn't at some point in
3 time, and if it isn't, I'm going to get it back, and we're
4 going to go battle on a class proof of claim. And if the
5 District Court says it's right, or the Circuit or wherever it
6 goes, that's just the way it's going to be. I mean I don't
7 determine what's appealable and what isn't.

8 MR. SPEIGHTS: But you do, Your Honor, and you do,
9 because if you dismiss and expunge these two separate class
10 claims, then I believe -- Mr. Bernick will -- if I say the sun
11 rises in the east, he being a good lawyer will say it rises in
12 the west. But I believe that that will give me a right to
13 appeal. In the alternative, if you take Mr. Bernick's plan, he
14 would have our appeal from the certification, be it down the
15 road a year or two or three, and he will be arguing to some
16 court equitable, moot, and this and everything else to try to
17 prevent Anderson from ever getting an appeal. So I would
18 respectfully say, Your Honor, you -- if you dismiss the claims
19 rather than put them in suspense, then I think that probably
20 would give Anderson a right to appeal.

21 THE COURT: Well, I think the first thing I want to
22 know is whether or not there really is anything that has to be
23 addressed with respect to these claims. It seems to me that
24 if, in fact, there have already been orders that have addressed
25 everything that's out there attached to these claims, and

1 there's nothing before me, I don't have any basis doing
2 anything with respect to these claims. If they're moot,
3 they're moot.

4 To the extent that Anderson is the only building
5 that's left, and the claim is already filed of record at
6 another claim, that's simply redundant. And as to Anderson
7 itself, not with respect to the class certification and the
8 other buildings, I don't have any problem saying that that
9 claim of Anderson Memorial Hospital itself is duplicative of
10 the other Anderson Memorial Hospital claim. But that's not
11 going to get you an appeal issue with respect to the other
12 buildings.

13 MR. SPEIGHTS: I'm not going to argue anymore today,
14 Your Honor. I'm sure those trying to catch planes will be
15 happy. What is a piece of paper that I can present to you to
16 inform you of what you've asked? Should it be a status report
17 maybe or --

18 THE COURT: Yes, why don't you just tell me on
19 November whatever, 13th or 14th? You can appear by phone, Mr.
20 Speights. You don't need to make a --

21 MR. SPEIGHTS: Well, I like -- I may file a piece of
22 paper or two, and I'll -- you've said before we could do status
23 reports.

24 THE COURT: Yes, that's fine. Do it by -- just if
25 you file something by November the 10th, so that you folks both

1 have a chance to take a look at the record, if you file
2 something -- I don't know if I have it linked to anything. I
3 don't know what I can link it to. Just file a status report
4 regarding the three proofs of claim, and if you will put the
5 proofs of claim number, Mr. Speights, on the document, so that
6 I know what it's linked to and tell me whether, in fact, there
7 have been orders that have been entered that have addressed the
8 buildings that are attached to those two proofs of claim.
9 That's really what I'm looking for at this point. And whatever
10 relief you think you would like, you can attach an order. I'll
11 -- I just -- I have to give it some thought, but I don't -- I
12 think if they're moot, I'm probably not going to be entering
13 some order that expunges the claims. I don't think I have
14 claims before me to expunge.

15 MR. SPEIGHTS: Thank you, Your Honor.

16 THE COURT: Okay.

17 MR. BERNICK: That's fine. Thank you.

18 THE COURT: Mr. Bernick, the debtor can do the same
19 thing.

20 MR. BERNICK: If I, you know -- yes, well wait to see
21 what Mr. Speights files. We'll just wait and see --

22 THE COURT: All right.

23 MR. BERNICK: -- but I think Your Honor already
24 grasps what the issue is.

25 THE COURT: Okay. Anything else?

1 (No verbal response)

2 THE COURT: We're adjourned. Thank you.

3 ALL: Thank you, Your Honor.

4 MR. BERNICK: I do think we have to give --

5 * * * * *

C E R T I F I C A T I O N

We, ELAINE HOWELL and PATRICIA C. REPKO, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Elaine Howell
ELAINE HOWELL

DATE: November 3, 2008

/s/ Patricia C. Repko
PATRICIA C. REPKO

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